(26,844)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 758.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1919.

COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the Twenty-seventh Day of September, 1918.

CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Appellant,

vs.

THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from the Kenton Circuit Court, Criminal, Common Law, and Equity Division.

Be it remembered that heretofore to-wit: on the 8th day of August 1917, the appellant by its attorneys filed in the office of the Clerk of the Court of Appeals, a transcript of the record, which is in words and figures as follows, to-wit:

2 Pleas before the Honorable the Kenton Circuit Court, at the Court-house, in Covington, on the 13th Day of June, 1917, Honorable F. M. Tracy, Judge Presiding, Criminal, Common Law, and Equity Division.

#3114.

COMMONWEALTH OF KENTUCKY

vs.

CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, a Corporation Organized under the Laws of the Commonwealth of Kentucky.

Be it remembered, that on the 19th day of February, 1916, the Grand Jury returned the following indictment:

Indictment.

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, a Corporation Organized under the laws of the Commonwealth of Kentucky, Defendant.

3 "The Grand Jury of Kenton County, in the name and by the authority of the Commonwealth of Kentucky accuse the

Cincinnati, Covington and Erlanger Railway Company, a corporation organized under the laws of the Commonwealth of Kentucky of the offense of unlawfully running and operating, on the — day of February, 1915, a line of railroad and thereon coaches and cars by electricity on a railroad track within this State without causing or having each separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without furnishing separate coaches for the transportation of white and colored passengers on its line of railroad, and without having each coach or car divided into compartments by a good and substantial wooden partition with a door therein, each compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, said defendant being then and there, and at all times mentioned in this indictment a corporation organized under the general railroad laws of this Commonwealth and authorized to operate a line of railroad ten miles in length in Kenton County between Covington and Erlanger and beyond, and having leased to the South Covington and Cincinnati Street Railwas Company, a corporation organized under the laws of the Commonwealth of Kentucky, its line of railroad and all its rights and privileges, and having authorized and permitted the acquisition by the South Covington and Cincin-

4 nati Street Railway Company of all its rights and privileges to operate said line of railroad as aforesaid, the defendant knowing at the time of the making of said lease and the acquisition by the South Covington and Cincinnati Street Railway Company of its rights and privileges that said company would not and did not intend to operate and run separate coaches for white and colored passengers and would not have such separate coaches bearing in some conspicuous place appropriate words in plain letters indicating the race for which they would be set apart, and would not have its coaches divided by good and substantial wooden partitions or otherwise, into separate compartments, each compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, the South Covington and Cincinnati Street Railway Company, and at the time mentioned in this indictment, operating under said lease and acquisition of the rights and privileges of the defendant, said line of railroad without having each separate coach for its white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without furnishing separate coaches for white and colored passengers, and without having its coaches divided by a good and substantial wooden partition, or other partition with a door therein, said compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart,

5 committed in manner and form as follows, to-wit:

That the said Cincinnati, Covington and Erlanger Company, an interurban railroad Company, is incorporated under the

general railroad laws of this Commonwealth, and was at all times mentioned in this indictment authorized to construct a railroad ten miles in length in the County and State aforesaid, between Covington and Erlanger and beyond, and was authorized under, and was at all times mentioned herein, a corporation under the general laws of this Commonwealth; that after said defendant had condemned and acquired land for its track between the City of Covington and the Lexington Pike at a point near the Buttermilk Pike in said County, said defendant leased to the South Covington and Cincinnati Street Railway Company its rights and privileges, and brought about the acquisition by the South Covington and Cincinnati Street Railway Company of its rights and privileges to operate said line of railroad. That the defendant was at all times mentioned herein, the lessor of said line of railroad and the South Covington and Cincinnati Street Railway Company the lessee of same; that the defendant leased said railroad and permitted and brought about the acquisition of its rights and privileges knowing that the South Covington and Cincinnati Street Railway Company would not operate and run separate coaches for its white and colored passengers and would not have separate coaches for the transportation of white and colored passengers on said line of railroad to bear in

6 some conspicuous place appropriate words in plain letters indicating the race for which they were set apart, and would not have its coaches divided by a good and substantial wooden partition or otherwise into compartments bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart. That the South Covington and Cincinnati Street Railway Company under said lease, by virtue of the same, and by the acquisition of the rights and privileges of the defendant company, the defendant company knowing the intended method of operation by the South Covington and Cincinnati Street Railway Company as above set out, did on the — day of February, 1915, operate said line of railroad from the City of Covington to the Lexington Pike at a point near the Buttermilk Pike, and that the said South Covington and Cincinnati Street Railway Company, a corporation duly organized under the laws of this Commonwealth, as aforesaid, and actually authorized under its lease and acquisition of the rights and privileges of the defendant to operate a line of railroad ten miles in length between Covington and Erlanger and beyond, in this County and State, and being then and there the lessee and owner of the rights and privileges of the said defendant, and in control of the said defendant, which was at all times mentioned herein, authorized to construct a line of railroad ten miles in length between Covington and Erlanger and beyond, did on the — day of February, A. D. 1915, and within twelve months next before the finding of this indictment, said defendant having theretofore know-

7 ingly permitted and authorized the South Covington and Cincinnati Street Railway Company so to do, as hereinabove set out, unlawfully operated a line of railroad and ran a railroad coach thereon by electricity in this County and State on a line of railroad extending from the City of Covington to the Lexington

Pike at a point near the Buttermilk Pike in Kenton County, Kentucky, without causing or having each separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart and without furnishing separate coaches for white and colored passengers, without having its coaches divided into compartments by a good and substantial wooden partition, or any partition, with a door therein, bearing in each compartment in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky."

(Signed) STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

Witnesses:
Dr. J. P. Riffe, Erlanger, Ky.
S. W. Adams, Erlanger, Ky.
Stephens L. Blakely, Covington, Ky.
John B. Dillon, Covington, Ky.
A. A. Shearer, Erlanger, Ky.

8 Thereupon on the same day, a Summons issued and was afterwards returned as follows:

Summons.

THE COMMONWEALTH OF KENTUCKY:

To any Sheriff, Coroner, Jailer, Constable, Marshal, or Policeman in this State:

You are commanded to summon Cincinnati, Covington and Erlanger Railway Company, a corporation to appear at the Kenton Circuit Court, at Covington, on the 9th day of March, 1916, to answer an indictment for a misdemeanor pending against it in said court.

Given under my hand as clerk of said court, this 19th day of February, 1916.

H. G. KLOSTERMANN, *Clerk,*
By CHAS. F. DROEGE, *D. C.*

Return.

Executed the within Summons February 21st, 1916, on Cincinnati, Covington and Erlanger Railway Company, by delivering a true copy hereof to W. W. Freeman, President of Cincinnati, Covington and Erlanger Railway Company.

JOHN ALLISON,
Sheriff, Kenton Co.,
By THOS. KENNEY, *D. S.*

Order Filing Motion for Trial.

At a sitting of said Court on March 14, 1916:
"Commonwealth filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."
STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

9 ERNST, CASSATT & COTTLE, *Contra.*

Order Setting Case for Trial May 2, 1916.

At a sitting of said Court on March 20, 1916.
"This case is set for trial on May 2, 1916."

Order Entering Demurrer to Indictment, Court Hears Argument, and Case Submitted.

At a sitting of said Court on May 2, 1916:
"Defendant entered demurrer to indictment. The Court hears argument and case is submitted."

Court Files Opinion, and Order Overruling Dem. to Indictment.

At a sitting of said Court on June 21, 1916:
"The Court files an opinion. The Demurrer to the indictment is overruled."

Order Filing Motion for Trial.

At a sitting of said Court on June 23, 1916:
"Plaintiff filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."
STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

ERNST, CASSATT & COTTLE, *Contra.*

Order Filing Motion for Trial.

At a sitting of said Court on August 2, 1916:
"Commonwealth filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."

STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

10 ERNST, CASSATT & COTTLE, *Contra.*

Order Setting Case for Trial on Nov. 21, 1916.

At a sitting of said Court on October 2, 1916:
"This case is set for trial on November 21, 1916."

Order for a Subpœna Duces Tecum.

At a sitting of said Court on November 18, 1916:
"The Commonwealth filed in the Clerk's office two motions for a subpœna duces tecum for Polk Lafoon and W. P. Horton, and it is ordered that Polk Lafoon and W. P. Horton, are ordered to appear on November 21st, 1916, at 9:30 A. M. and bring with them all records, books and papers in their possession under their control and in their custody showing any agreement, understanding, or contract between the South Covington and Cin'ti Street Railway Company and the Covington, Cincinnati and Erlanger St. Ry. Company, as to the method of operation of street cars by said Company, and also records showing the number of cars operated over what is known as the Ft. Mitchell line in Com'th of Kentucky, during month- of February and March, 1915."

Order Filing Motion for Trial.

At a sitting of said Court on March 5, 1917:
"The Commonwealth filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."

STEPHENS L. BLAKELY,
Attorney for the Com'lth.

ERNST, CASSATT & COTTLE, *Contra.*

11 *Order Continuing Motion for Trial.*

At a sitting of said Court on March 19, 1917:
"Commonwealth's motion for trial is continued."

Order Setting for Hearing on Motion to Dismiss Indictment.

At a sitting of said Court on May 2, 1917:
"The Court hears oral arguments. Defendant offered in open Court motion to dismiss indictment, to which the Commonwealth objects. Said objection is overruled and a motion filed to which the Commonwealth excepts."

Said Motion is as follows:

Motion.

"Now comes the defendant, at the close of all the evidence, and moves the Court for the dismissal of the indictment and the acquittal of the defendant on the following grounds:

1. That the Statute of Kentucky under which the indictment is made or drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.

2. That the Statute of Kentucky under which the indictment is made if held applicable to the case made by the indictment herein, and the evidence offered in support thereof, is an unlawful and unreasonable interference with and regulation of interstate commerce and is in violation of Article 1, Section VIII, of the Constitution of the United States.

12 3. That defendant was not at the time covered by the indictment running or otherwise operating a railroad within the meaning of the Statute of Kentucky upon which the indictment herein is founded.

4. That material allegations of the indictment are not supported by sufficient evidence, nor by any evidence."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Submitting Case.

At a meeting of said Court on the same day, May 2, 1917:
"This case is submitted."

Order Filing Brief.

At a sitting of said Court on May 17, 1917:
"Defendant filed in the clerk's office a Brief."

Order Filing Opinion and Judgment.

At a sitting of said Court on June 13, 1917:
"The Court files an opinion. The law and facts being submitted to the court it is adjudged that the defendant is guilty as charged in the indictment. The defendant will pay a fine of $500.00 to which the defendant excepts."

Order Filing Motion for New Trial.

At a sitting of said Court on June 15, 1917:
"Defendant filed in open court a Motion for new trial."

Said Motion is as follows:

Motion.

"Now comes the defendant and moves that the finding and judgment of the court be set aside and for a new trial on the following grounds:

1. The verdict is against the evidence.
2. The verdict is against the law.
3. The court erred in overruling the motion of the defend-
13 ant at the close of all the evidence for the dismissal of the indictment, and the acquittal of the defendant on the following grounds, and each of them:

1. That the Statute of Kentucky under which the indictment is made or drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII, of the Constitution of the United States.

2. That the Statute of Kentucky under which the indictment is made if held applicable to the case made by the indictment herein and the evidence offered in support thereof, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.

3. That defendant was not at the time covered by the indictment, running or otherwise operating a railroad within the meaning of the Statute of Kentucky, upon which the indictment herein is founded.

4. That material allegations of the indictment are not supported by sufficient evidence, nor by any evidence.

Wherefore defendant prays that the verdict and judgment of the Court be set aside and a new trial granted."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Filing Stipulation.

At a sitting of said Court on July 24, 1917:
"Parties filed in the clerk's office a Stipulation."

14 Said stipulation is as follows:

Stipulation.

"It is stipulated that the bill of evidence and exceptions in the case of Commonwealth of Kentucky vs. The South Covington and Cincinnati Street Railway Company, No. 3094 on the docket of this court shall be considered a part of this transcript without being attached hereto."

STEPHENS L. BLAKELY,
Attorney for the Plaintiff.
ERNST, CASSATT & COTTLE,
Attorneys for the Defendant.

Order Overruling Motion for New Trial and Order Filing Motion for Arrest of Judgment.

At a sitting of said Court on June 25th. 1917:
"Defendant's motion for new trial is overruled, to which the defendant excepts. Defendant filed in open Court Motion for Arrest of Judgment."

Said Motion is as follows:

Motion.

"Defendant moves the Court to arrest the judgment in this cause because the facts stated in the indictment do not constitute a public offense within the jurisdiction of the Court."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Overruling Motion for Arrest of Judgment; Prays an Appeal to Court of Appeals, Which is Granted.

At a sitting of said Court on the same day, June 25, 1917:
"The Motion for Arrest of Judgment is overruled, to which the defendant excepts and prays an appeal to the Court of Appeals, which is granted."

15 On June 27th., 1917, the defendant executed the following Supersedeas Bond:

Supersedeas Bond.

COMMONWEALTH OF KENTUCKY, Plaintiff,

VS.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY CO., Defendant.

We undertake that the defendant, The Cincinnati, Covington and Erlanger Railway Company, will pay to the Commonwealth of Kentucky, all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said Court, rendered June 13th., 1917, for Five Hundred Dollars ($500.00); also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the Court passing upon said appeal may render or order to be rendered by the inferior Court, not exceeding in amount or value the said judgment appealed from; also that said defendant will satisfy all rents, hire or damage accruing during the pendency of said appeal, upon or to any property of which said defendant may be kept out of possession by reason of said appeal.

Witness our hands, this June 27th, 1917.

THE CINCINNATI, COVINGTON AND ERLANGER RWY. CO.,
By ERNST, CASSATT AND COTTLE, *Attorneys.*
AMERICAN SURETY COMPANY OF NEW YORK,
16 By U. J. HOWARD, *Resident Vice President.*

Attest:

[SEAL.] ED. E. WALKER,
Resident Asst. Secretary.

Approved:

H. G. KLOSTERMANN, *Clerk,*
By R. T. VON HOENE, *D. C.*

Order Filing Bill of Evidence and Exceptions and Order Filing Schedule.

At a sitting of said Court on Jule 24th. 1917:

"Defendant filed in open Court Bill of Evidence and Exceptions, and the Court takes time on the motion to sign the same. Defendant filed in the clerk's office a Schedule."

Said Schedule is as follows:

Schedule.

"The Clerk will copy the entire record herein for an appeal to the Court of Appeals."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Signing Bill of Evidence; Same is Made a Part of the Record Without Being Spread upon the Order Book.

At a sitting of said Court on July 27th., 1917:
"The Court signed in open Court a Bill of Evidence and Exceptions heretofore tendered and the same is made a part of the record without being spread upon *on* the Order Book."

17-74 Kenton Circuit Court.

I, H. G. Klostermann, Clerk of said Court, certify that this and the preceding fifteen pages contain a true and complete transcript of the record in the cause styled in the caption.

Given under my hand as Clerk of said Court, this 6th. day of August, 1917.

H. G. KLOSTERMAN,
Clerk of the Kenton Circuit Court,
By CHAS. DROEGE, *D. C.*

* * * * * * *

75 Be it remembered that at a Court of Appeals held in and for the Commonwealth aforesaid, at the Capitol at Frankfort, on the 21st., day of December 1917, the following Order was entered, to-wit:

Kenton.

CINCINNATI, COVINGTON & ERLANGER RAILWAY CO.

VS.

COMMONWEALTH.

Came the appellant by counsel, and filed notice, and grounds and moved the Court to grant an oral argument herein, which motion is submitted.

The motion for oral argument filed by the foregoing order is in words and figures, following, to-wit:

76 Court of Appeals of Kentucky.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO., Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Notice of Application for Oral Argument.

You are hereby notified that counsel for appellants have this day filed a motion for oral argument in the above entitled cases.

J. C. W. BECKHAM,
ERNST, CASSATT & COTTLE,
Attys. for Appellants.

77 Covington, Ky., December —, 1917.

Service of the above notice is hereby acknowledged and the undersigned consents to the granting of the motion.

STEPHEN S. BLAKELY.

78 Court of Appeals of Kentucky.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO., Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

CINCINNATI, COVINGTON & ERLANGER RAILWAY CO., Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Application for Oral Argument.

Now come the appellants and move the court that the above entitled cases be passed for oral argument and be set for hearing at the convenience of the court.

Statement.

These cases are appeals from the Kenton Circuit Court. They were heard together in the court below and by stipulation filed in this court are heard together here.

79 Appellan's were charged by simultaneous indictment in the Kenton Circuit Court with a violation of Section 795 of the Kentucky Statutes, which is in part as follows:

"Any railroad company or corporation * * * running or otherwise operating railroad cars or coaches * * * who may be now or may hereafter be engaged in running or operating any of the railroads of this state either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railway.

It is not contended that the section quoted would of itself apply to either of the appellants, but it is claimed to be made applicable by Section 842*a*, paragraph 1, of the Kentucky Statutes, which is as follows:

"All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, *so far as practicable*, and shall have the same rights, powers and privileges as *is* now granted to or conferred upon railroad corporations existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted." (Italics ours.)

A jury was waived and the law and facts submitted to the court which found both defendants guilty.

The appellant, The South Covington & Cincinnati Street Railway Co. is a street railway Company organized under a special charter granted January 25, 1876, and having authority to construct and operate street railways in the City of Covington and vicinity.

80 Since the time of its organization it has been engaged in the operation of street railway lines in Covington and Newport and adjacent towns and territory, as appears from a plat attached to the opening brief for appellants.

The appellant, Cincinnati, Covington & Erlanger Railway Co. is a corporation organized under the general railroad laws of the State of Kentucky prior to the passenger of #842*a* above referred to, and having authority to construct and operate an electric railway from the City of Covington to the town of Erlanger, a distance of about six miles, and to such further point beyond Erlanger as my be determined.

The road of the Erlanger Company has been constructed from the City of Covington to a point just beyond the suburban town called Ft. Mitchell, a total distance of 4.75 miles.

The South Covington & Cincinnati St. Ry. Co. furnished the money to build the road and at the time covered by the indictment was operating on said road a branch or part of its street railway system, operating its ordinary street cars by continuous trip over said line and through Covington and Cincinnati, charging a five cent fare, stopping at all street corners and road intersections, giving universal transfers and carrying no freight or express matter.

It seems clear from the Statutes quoted that separate coaches or

compartments for colored passengers are required only in the case of companies "engaged in running or operating any of the railroads of this State."

81 This court held in Louisville R. R. Co. vs. Commonwealth, 130 Ky. 738, that the Statute applies to an interurban railroad but does not apply to a "street railway operating within the territory to which its charter confines it."

It was also held in that case that the test of guilt was the actual character of the operation and not the charter power of the defendant.

In the cases at bar the Commonwealth did not show, nor did it appear that at the time covered by the indictment an interurban railroad was being operated over the tracks in question by either company, but both companies were found guilty, apparently on the theory that as the Erlanger Company which owned the tracks, was authorized to operate an interurban railroad, any company operating over its tracks was bound to furnish separate coaches or compartments for colored people, irrespective of the character of the actual operation.

The judgments below seem to be directly at variance with the principle of the decision of this court in Louisville R. R. Co. v. Commonwealth, 130 Ky. 738, and if applied generally would work a great hardship not only upon appellants, but upon other street railway systems which have extended some of their lines into outlying suburban territory.

Because of the practical hardship of the judgments below and what we believe to be the erroneous construction of the statutes, and also because of the importance of this question in the State

82 at large, we request that an oral argument be granted.

J. C. W. BECKHAM,
ERNST, CASSATT & COTTLE.
Attys. for Appellants.

83 Be it remembered that heretofore, to-wit, at a Court of Appeals held as aforesaid on the 7th day of January 1918, the following order was entered, to-wit:

Kent.

CINCINNATI, COVINGTON & ERLANGER RY. CO.

vs.

COMMONWEALTH.

The Court being sufficiently advised the motion for oral argument is sustained, and the case continued until the Spring Term for Argument.

Be it remembered that at a Court of Appeals held as aforesaid on the 24th day of May, 1918, the following order was entered, to-wit:

CINCINNATI, COVINGTON & ERLANGER RY. CO.

vs.

COMMONWEALTH KENTUCKY.

This case coming on to be heard, was argued by Stephen L. Blakely for the Appellee, and A. J. Cassatt for the appellant, and submitted.

Be it remembered that at a Court of Appeals, held in and for the Commonwealth of Kentucky at the Capitol at Frankfort, on the 27th day of September, 1918, the following order and Judgment was entered, to-wit:

Kenton Circuit Court, Criminal, Common Law, and Equity.

CINCINNATI, COVINGTON AND ERLANGER RY. CO., Appellant,

v.

COMMONWEALTH OF KENTUCKY, Appellee.

84-97 The Court being sufficiently advised, it seems to it, there is no error in the judgment herein.

It is therefore considered that said Judgment be affirmed, and that the appellee recover of the appellant 10 per cent damages on the amount of the Judgment superseded herein, which is ordered certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

And at the same time the Court delivered an opinion herein in words and figures as follows, to-wit:

* * * * * * *

98 Be it remembered, that afterwards, to-wit, on the 8th day of November, 1918, the appellant, Cincinnati, Covington & Erlanger Railway Company, filed in the office of the Clerk of the Court of Appeals of Kentucky an Assignment of Errors which is in words and figures as follows, to-wit:

99 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Assignment of Errors.

Now comes the plaintiff in error and respectfully submits that in the proceedings and in the final judgment of the Court of Appeals

of the State of Kentucky in the above entitled case there is manifest error in this, to-wit:

1. The Court of Appeals erred in holding that Sections 795, 797 and 842*a* of the Kentucky Statutes are not an unlawful and unreasonable interference with and regulation of interstate commerce in conflict with and in violation of the provisions of Article I, Section 8 of the Constitution of the United States.

2. The Court of Appeals of Kentucky erred in holding that Sections 795, 797 and 842*a* of the Kentucky Statutes were applicable to the case made by the indictment herein and the evidence offered in support thereof, and not an unlawful and unreasonable interference with and regulation of interstate commerce and not in violation of Article I, Section 8 of the Constitution of the United States.

3. Said court erred in holding that the operation of the particular car, for which operation this plaintiff in error was found guilty of a criminal offense under Sections 795 and 797 of the Kentucky Statutes and punished for said alleged crime, was intrastate com-
100 merce, over which the State of Kentucky had power to exercise the authority asserted by said sections of the Kentucky Statutes.

4. Said court erred in holding that the regulation and control asserted by appellee (defendant in error) over the acts and doings of appellant (plaintiff in error) as shown by the record, and upheld and approved by the judgment of the Court of Appeals, were not and are not unlawful and unreasonable interference with the regulation of interstate commerce and not in violation of Article I, Section 8 of the Constitution of the United States.

5. Said court erred in entering judgment for defendant in error (appellee) and in affirming the judgment in its favor of the Kenton Circuit Court.

ERNST, CASSATT & COTTLE,
Attorneys for Plaintiff in Error.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

100½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Assignment of Errors. Filed Nov. 8, 1918. R. W. Keenon, C. C. A. Ernst, Cassatt & Cottle, Attorneys for Plaintiff in Error.

101 And on said date, to-wit, November 8, 1918, there was filed in the office of the Clerk of the Court of Appeals a Petition for a Writ of Error and which is attached hereto and is as follows:

102 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Petition for Writ of Error from the Supreme Court of the United States.

To the Honorable W. E. Settle, Chief Justice of the Court of Appeals of Kentucky:

Plaintiff in error, The Cincinnati, Covington and Erlanger Railway Company, alleges that on the 27 day of September, 1912, the Court of Appeals of the State of Kentucky entered a final order and judgment herein in favor of the defendant in error, The Commonwealth of Kentucky, in which final order and judgment and the proceedings at the trial thereof in this cause certain errors were committed to the prejudice of the plaintiff in error, all of which will appear more in detail from the assignment of errors which is filed with this petition.

That said Court of Appeals of the State of Kentucky is the highest court in said State in which a decision in said suit could be had and there was drawn in question therein the validity of statutes of, or an authority exercised under said State, on the ground that the same were repugnant to the Constitution of the United States and the decision therein was in favor of their validity.

103 Wherefore plaintiff in error prays that a writ of error from the Supreme Court of the United States may issue to the Court of Appeals of the State of Kentucky for the correction of the errors so complained of and that a transcript of the record herein, duly authenticated, may be sent to the Supreme Court of the United States.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY,
By ERNST, CASSATT & COTTLE,
Its Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 8 day of November, 1918, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $1200.00. Dated at Frankfort, Kentucky, this 8 day of November, 1918.

W. E. SETTLE,
Chief Justice of the Court of Appeals of the State of Kentucky.

Filed in my office this 8th day of November, 1918.
RODMAN W. KEENON,
Clerk of the Court of Appeals
of the State of Kentucky,
By W. B. O'CONNELL, *Deputy Clerk.*

103½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Petition for Writ of Error from the Supreme Court of the United States. Filed Nov. 8, 1918. R. W. Keenon, C. C. A. Ernst, Cassatt & Cottle, Attorneys for Plaintiff in Error.

104 And on said date, to-wit, November 8, 1918 there was filed in the office of the Clerk of the Court of Appeals a Writ of Error from the Supreme Court of the United States and the order allowing same by the Chief Justice of the Kentucky Court of Appeals, and which are attached hereto as follows, to-wit:

105 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between The Cincinnati, Covington and Erlanger Railway Company, a corporation under the laws of Kentucky, and the Commonwealth of Kentucky, wherein was drawn in question the validity of certain statutes of, or authority exercised under said State of Kentucky, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity, a manifest error hath happened, to the great damage of the said The Cincinnati, Covington and Erlanger Railway Company, as by its complaint appears, we being will-

106 ing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of Dec., 1918, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said Supreme Court, the 8th day of Novr., in the year of our Lord One Thousand Nine Hundred and 18.

[Seal United States of America, Eastern Kty. Dist. Court.]

JOHN W. MENZIES,
Clerk U. S. District Court, Eastern District of Kentucky,
By CHAS. N. WIARD, *D. C.*

Allowed by
W. E. SETTLE,
Chief Justice, Kentucky Court of Appeals.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

106½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

107 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Allowance of Writ of Error.

This cause coming on to be heard on the petition of The Cincinnati, Covington and Erlanger Railway Company, plaintiff in error (appellant) for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon

examination of said petition and the record in said matter and desiring to give the petitioner opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be and it is hereby allowed to this court from the Supreme Court of the United States, and the plaintiff in error having presented a bond in the sum of $1200.00, with American Surety Co. of N. Y. as surety, to operate as its supersedeas, the same is hereby approved.

W. E. SETTLE,
Chief Justice.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

107½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Allowance of Writ of Error. Filed Nov. 8, 1918, R. W. Keenon, C. C. A.

108 And on said date, November 8, 1918, there was filed in the office of the Clerk of the Court of Appeals a Writ of Error Bond, and which is in words and figures as follows, to-wit:

109 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Bond.

Know all men by these presents, that we, The Cincinnati, Covington and Erlanger Railway Company, as principal, and American Surety Co. of N. Y., as surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of Twelve Hundred Dollars to be paid to the said obligee, its successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of November, 1918.

Whereas the plaintiff in error hath prayed a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of

error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,
By ERNST, CASSATT & COTTLE,
Its Attorneys.
AMERICAN SURETY CO. OF N. Y.,
Per D. D. SMITH,
Atty-in-fact.

I hereby approve the foregoing bond and surety this November 8th, 1918.

W. E. SETTLE,
Chief Justice.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

109½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Bond. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

110 And afterwards, to-wit, on the 8th day of November 1918, there was filed in the Clerk's office of the Court of Appeals, the original citation with acceptance of service thereon, and which is hereto attached as follows:

111 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Citation.

To the Commonwealth of Kentucky:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein The Cincinnati, Covington and Erlanger Railway Company is appellant (plaintiff in error) and you are appellee (defendant in error) to show cause, if any there be, why the judgment against appellant (plaintiff in error) as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. E. Settle, Chief Justice of the Court of Appeals of Kentucky, this 8 day of November, 1918.

W. E. SETTLE,
Chief Justice.

Copy of the within citation received this 8th day of November, 1918, and service accepted.

CHARLES H. MORRIS,
Attorney General, Kentucky.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

111½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Citation. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

112 And afterwards, to-wit, on the 8th day of November, 1918, there was filed in the office of the Clerk of the Court of Appeals, the original præcipe with acceptance of service thereon, and which is hereto attached as follows:

113 The Court of Appeals of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Appellant (Plaintiff in Error),

vs.

THE COMMONWEALTH OF KENTUCKY, Appellee (Defendant in Error).

Precipe.

To the Clerk of the Court of Appeals of Kentucky:

Please make a transcript of the record and proceedings in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, and include therein the following:

1. The entire record in this cause including bill of exceptions.
2. Opinion of Court of Appeals.
3. The assignment of errors, petition for writ of error, order allowing same, bond, order approving same, citation and return of service of same, this precipe and the return of service of same.

ERNST, CASSATT & COTTLE,
Attorneys for the Above-named Appellant (Plaintiff in Error), The Cincinnati, Covington & Erlanger Railway Company.

Copy of the above precipe received and service of same hereby accepted and acknowledged this 8th day of November, 1918.

CHARLES H. MORRIS,
Attorney General of Kentucky, Attorney for Appellee (Defendant in Error), The Commonwealth of Kentucky.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

113½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington and Erlanger Railway Co., Appellant, vs. The Commonwealth of Kentucky, Appellee. Precipe. Ernst, Cassatt & Cottle, Attorneys for Appellant.

114 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record in the case of Cincinnati, Covington & Erlanger Railway Company vs. The Commonwealth of Kentucky, with all things touching the same, as appears from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, Kentucky, on this the 20th day of November, 1918.

[Seal Kentucky Court of Appeals.]

R. W. KEENON,
Clerk of the Court of Appeals of Kentucky.
By W. B. O'CONNELL, *D. C.*

Fee for this transcript 35.00.

115 In the Supreme Court of the United States, October Term, 1918.

No. 758.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

Stipulation.

Whereas, this case was tried below with the case of The South Covington and Cincinnati Street Railway Company vs. Common-

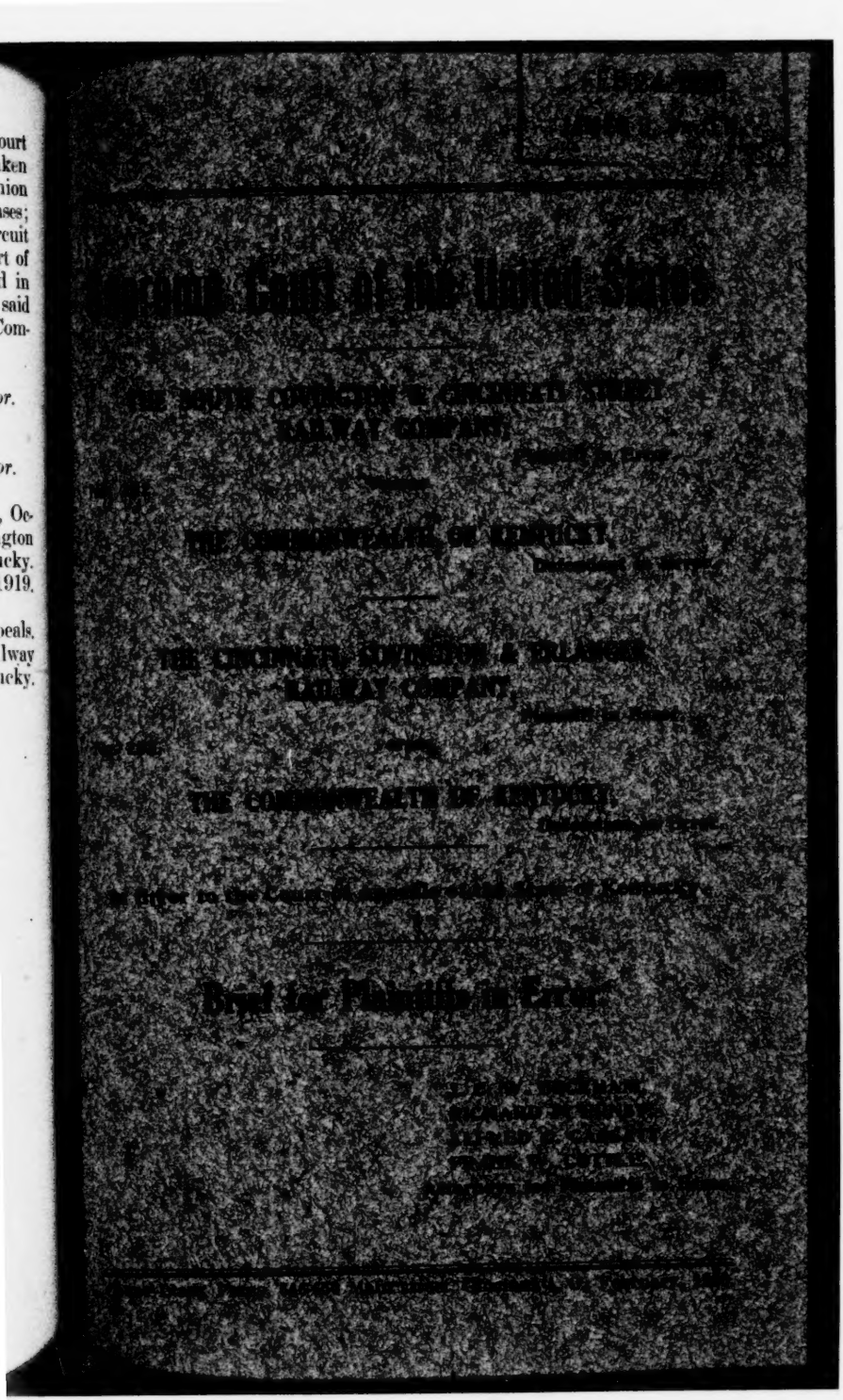
wealth of Kentucky, No. 757, October Term, 1918, Supreme Court of the United States, and the bill of evidence and exceptions taken in the Circuit Court of Kenton County, Kentucky, and the opinion of the Court of Appeals of Kentucky are the *the* same in both cases;

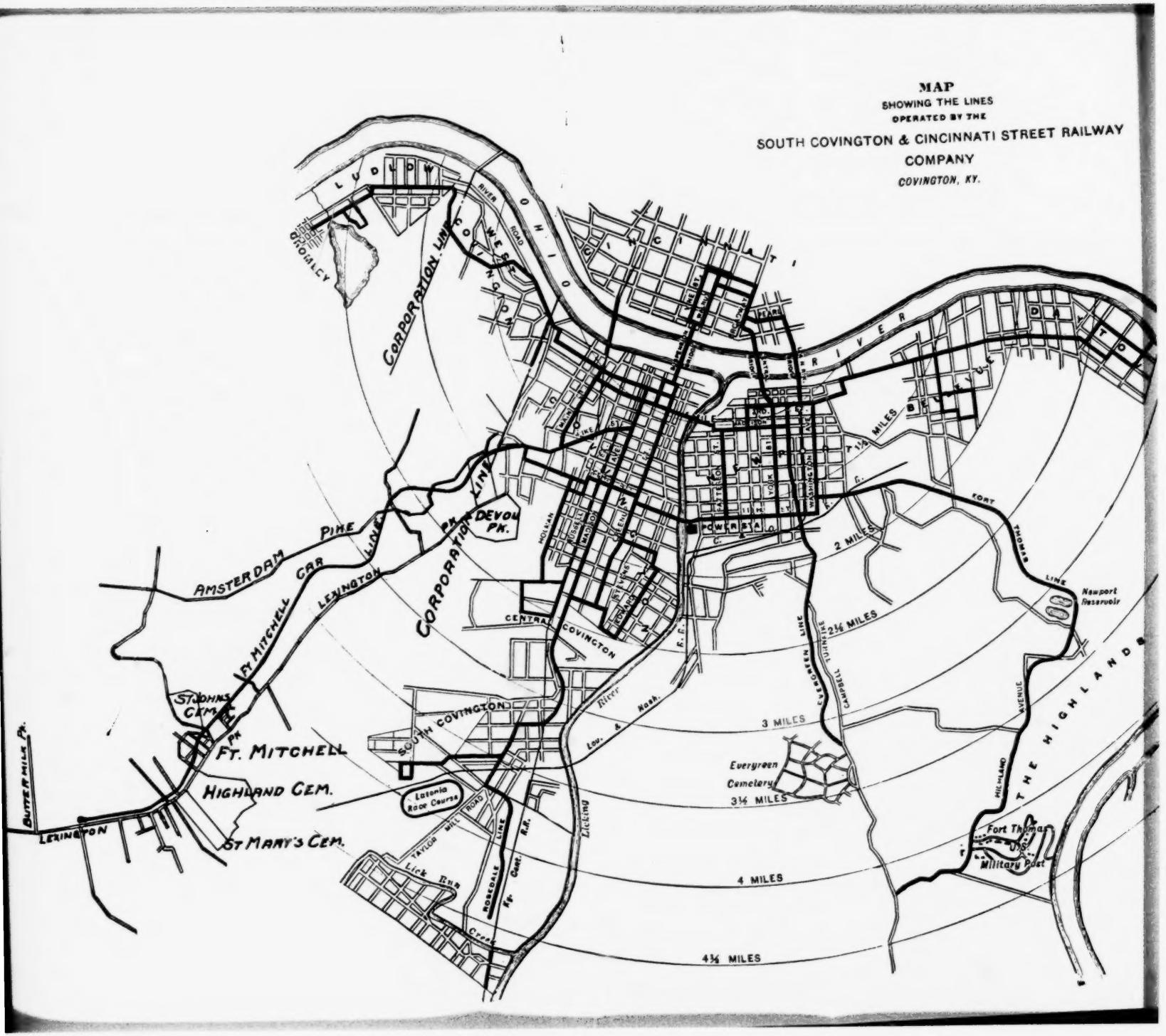
It is agreed that the bill of evidence and exceptions in the Circuit Court of Kenton County, Kentucky, and the opinion of the Court of Appeals of Kentucky, may be omitted from the printed record in this case and reference for same had to the printed record in the said case of The South Covington and Cincinnati Street Railway Company No. 757.

ALFRED C. CASSATT,
Attorney and Solicitor for Plaintiff in Error.
CHARLES H. MORRIS,
Attorney General of Kentucky and
Solicitor for Defendant in Error.

116 [Endorsed:] File No. 26,844. Supreme Court U. S., October Term, 1918. Term No. 758. Cincinnati, Covington & Erlanger Ry. Co., Pl'ff in Error, vs. Commonwealth of Kentucky. Stipulation to omit parts of record in printing. Filed Jan. 29, 1919.

Endorsed on cover: File No. 26,844. Kentucky Court of Appeals. Term No. 758. The Cincinnati, Covington & Erlanger Railway Company, plaintiff in error, vs. The Commonwealth of Kentucky. Filed December 3d, 1918. File No. 26,844.




MAP
SHOWING THE LINES
OPERATED BY THE
SOUTH COVINGTON & CINCINNATI STREET RAILWAY
COMPANY
COVINGTON, KY.
LUDLOW
RIVER ROAD
OHIO
CINCINNATI
RIVER
CORPORATION LINE
FORT WRIGHT
DIXIE HIGHWAY
BEECH GROVE
1½ MILES
2 MILES
FORT THOMAS LINE
Newport Reservoir
AMSTERDAM PIKE
CAR LINE
BY MITCHELL
LEXINGTON
CORPORATION LINE
PK.
DEVOU PK.
HOLMAN
RUSSELL
MADISON
CENTRAL
COVINGTON
2½ MILES
EVERGREEN LINE
CAMPBELL TURNPIKE
ST. JOHNS CEM.
BUTLER HILL PK.
PK.
FT. MITCHELL
HIGHLAND CEM.
ST MARY'S CEM.
LEXINGTON
SOUTH COVINGTON
Low. & Nash.
River
3 MILES
Evergreen Cemetery
3½ MILES
HIGHLAND AVENUE
THE HIGHLANDS
Latonia Race Course
TAYLOR MILL ROAD
Lick Run
ROSEDALE LINE
Ft. Cent. R.R.
Creek
LICKING
4 MILES
Fort Thomas
U.S. Military Post
4½ MILES

INDEX.

LIST OF CASES.

Supreme Court of the United States

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error,

No. 252. *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,
Plaintiff in Error,

No. 253. *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief for Plaintiffs in Error.

STATEMENT OF CASE.

These are proceedings in error to reverse judgments of the Court of Appeals of Kentucky which affirmed judgments of the Circuit Court of Kenton County, Ken-

tucky, convicting plaintiffs in error of violations of the Kentucky Separate Coach Law.

Plaintiffs in error were charged by separate indictments under the same date in the Kenton Circuit Court.

The two cases were by agreement heard together without a jury in the Circuit Court and were heard together in the Kentucky Court of Appeals, but on separate records.

The record in *The South Covington & Cincinnati Street Railway Co.* v. *Commonwealth of Kentucky*, No. 757 October Term, 1918, in this court, contains the bill of evidence (page 11) upon which both cases were heard. The bill of evidence is also contained in the original record filed in this court in *Cincinnati, Covington & Erlanger Railway Co.* v. *Commonwealth of Kentucky*, No. 758 October Term, 1918, but is by agreement omitted as unnecessary in the printed record in that case.

In each case the defendant, by written motion for dismissal of indictment and acquittal, made and filed at the close of the evidence, claimed that the statute of Kentucky under which the indictment was had, and its application to the facts of each particular case, constituted an unlawful and unreasonable interference with interstate commerce in violation of the Federal Constitution (Case No. 757, Rec., pp. 7, 44). The same claim was made on the motion for a new trial (same case page 8) and on argument in the Court of Appeals.

This Federal defense was decided by the Kentucky Court of Appeals adversely to plaintiffs in error (Assignment of Errors, Rec., same case, p. 56).

The principal question involved in this court is the same in both cases and we may therefore confine ourselves in the first instance to *South Covington & Cincin-*

THE LAW.

The indictment was had under Sections 795-801 of the Statutes of Kentucky which are as follows:

"Section 795. *Separate coaches or compartments for white and colored passengers.* Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line or track within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

"Section 796. *No discrimination in coaches or compartments.* That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

"Section 797. *Misdemeanor-penalty.* That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of Sections 795 and 796 shall be deemed guilty of a misdemeanor, and, upon indictment and conviction thereof, shall be fined not less than five hundred nor more than one thousand five hundred dollars for each offense.

"Section 798. *Jurisdiction of circuit courts.* That all circuit courts in which railroads are operated in this State shall have complete jurisdiction over such offenses.

"Section 799. *Duties and powers of conductors of trains.* The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off the train. And for such refusal and putting off the train neither the manager, conductor, nor railroad company shall be liable for damages in any court.

"Section 800. *Penalty imposed on conductors for violation of duty.* That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of Section 799 shall, upon conviction, be fined not less than fifty nor more than one hundred dollars for each offense.

"Section 801. *Persons to whom act not applicable.* The provisions of this act shall not apply to employees of railroads or persons employed as nurses, or officers in charge of prisoners [nor shall the same apply to the transportation of passengers in any caboose car attached to a freight train]. (Words in brackets added by amendment of March 15, 1894.)

It is not contended by the Commonwealth that Sections 795-801 would of themselves apply to either of the defendants, but it is claimed that they are made applicable by Section 842a, paragraph 1 of the Kentucky Statutes, which is as follows:

"Section 842a. 1. *Interurban electric railroads placed on same footing as railroads.* All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, so far as practicable, and shall have the same rights, powers and privileges as is now granted to or conferred upon railroad corporations, existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted."

The foregoing statutes do not apply to a street railway. The Court of Appeals of Kentucky said in *Louisville Railway Co.* v. *Commonwealth*, 130 Ky., 738:

"A street railway operating within the territory to which its charter confines it, is not required by law to provide separate cars or separate compartments in its cars for the transportation of white and colored passengers."

THE INDICTMENT.

The indictment against the South Covington and Cincinnati Street Railway Co. is to be found on pages 1-3 of the Record and charges the defendant with

> "the offense of unlawfully running and operating a coach or car by electricity on a railroad track on the — day of February, 1915, within this State and county, without causing or having each separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without furnishing separate coaches for white and colored passengers, and without having its coach or car divided by a good and substantial wooden partition, or other partition, dividing the same into compartments with a door therein, and each separate compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart." (Top p. 2.)

CLAIM OF PLAINTIFFS IN ERROR.

The indictment charges the South Covington Company with operating a car on a railroad track in the State of Kentucky without providing a separate compartment or coach for the transportation of colored passengers.

The undisputed evidence shows that the company was engaged solely in the operation of a street railway system whose principal business was interstate commerce —the carriage of passengers between Cincinnati and the

Kentucky cities across the Ohio River; that the car in question, for whose operation the company was indicted, was an ordinary single truck street car seating thirty-two passengers (R., 28), about twenty-one feet in length, inside measurement, solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and well populated territory adjacent thereto, to a point near Fort Mitchell, a suburb, about five miles distant. Eighty per cent. of the passengers carried were interstate. Not to exceed six per cent. of the passengers carried at any time were colored and on a large proportion of the trips no colored passengers were carried.

Plaintiffs claim that the requirement that such a car so engaged should maintain a separate compartment or carry a separate coach for colored passengers is upon the facts in this case a direct and unreasonable regulation of interstate commerce and that the Kentucky law so construed as to make such requirement is in violation of the interstate commerce clause of the Federal Constitution.

In the State Court the Company defended also on the ground that the separate coach act did not apply to it because it was not a railroad nor an interurban railroad within the meaning of the Statute but was a mere street railway company.

The court below held, however, that one of its lines, namely, the Fort Mitchell or Erlanger line, on which the car in question was operated, was theoretically an interurban line within the meaning of the separate coach act and Section 842a, *supra,* because the portion of that line outside of the city limits of Covington was operated over tracks belonging to The Cincinnati, Covington & Erlanger Railway Co. (the other plaintiff in error)

which was (so the court held) organized as an interurban line.

The court held that although the car in question was an ordinary street car operated as a part of The South Covington & Cincinnati Street Railway Co. system, it must be deemed to be an interurban car for the purposes of this indictment under the statutes quoted above, because for a portion of its interstate trip between Fort Mitchell and Cincinnati it operated over the so-called interurban line of The Cincinnati, Covington & Erlanger Railway Co.

While the decision or judgment of the Kentucky Court of Appeals may be conclusive on the state question, namely, whether the car covered by the indictment was an interurban car for the purposes of the indictment, its judgment is not at all conclusive in this court as to the actual nature of the operation involved, for the purpose of the determination by this court whether the application of the separate coach law to such operation was an illegal regulation of and burden upon interstate commerce.

This court will consider the facts independently, especially where, as in this case, there is no conflict of testimony.

In *Mississippi Railroad Commission* v. *Illinois Central Railroad Co.*, 203 U. S., 335, the court had under consideration an order of a State Railroad Commission stopping interstate trains at stations. The court said on pages 344, 345:

> "In reviewing statutes of this nature, and also orders made by a state railroad commission, it frequently becomes necessary to examine the facts upon which they rest and to determine from such examination whether there has been an un-

constitutional exercise of power and an illegal interference by the state or its commission with the interstate commerce of the railroad. Whether there has or has not been such an interference is a question of law arising from the facts."

In *Southern Pacific Co.* v. *Schuyler*, 227 U. S., 601, 611, the court said:

> "and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S., 573, 591; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S., 655, 668; *Creswill* v. *Knights of Pythias*, 225 U. S., 246, 261."

To the same effect are the following cases in which this court held state laws or regulations to be, under the facts in each case, an unconstitutional interference with interstate commerce.

Chicago, Burlington & Quincy Railroad Co. v. *Railroad Commission of Wisconsin*, 237 U. S., 220, in which the court held invalid, under the facts in that case, an order of the Railroad Commission of Wisconsin requir-

ing the railroad company to stop certain trains at the station of Cochran.

Seaboard Air Line Railway Co. v. *Blackwell,* 244 U. S., 310, where the court held invalid the "Blow-Post" law of Georgia under the facts of that case.

Missouri, Kansas & Texas Railway Co. v. *State of Texas,* 245 U. S., 484, where the court held invalid, under the facts of that case, an order of the State Railroad Commission of Texas relative to schedules of trains.

We therefore call the court's attention to the testimony in the record, which is undisputed and which shows the precise nature of the operation involved and the application thereto of the Separate Coach Law of Kentucky.

These cases were tried upon a plea of "not guilty" to the indictment, whose effect as a plea under the Kentucky law is set forth in Section 175 of the Criminal Code, which is as follows:

> The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact tending to establish a defense, other than a former conviction or acquittal, may be given in evidence under it."

THE FACTS.

Plaintiff in error, The South Covington & Cincinnati Street Railway Co. was incorporated by a Special Act of the General Assembly of Kentucky January 25, 1876 (Rec., p. 12, *et seq.*). The purpose of its incorporation was

> "the construction, operation and management of street railways in the City of Covington and

> vicinity; and along such streets and public highways in the city as the council shall grant the right of way to; and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of." (Rec., 12.)

The charter provided that the company might "by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway or interest therein in Covington, Newport or vicinity."

The company was also authorized, Section 4,

> "to connect with and use the track of any other railway company in the City of Covington and vicinity," etc.

The name of the company as fixed by its charter and its powers as therein set forth, exhibit the purpose of its organization to have been the construction and operation of street railway lines connecting Cincinnati and the Kentucky towns and surrounding territory.

This court held in *South Covington & Cincinnati Street Railway Co.* v. *Covington,* 235 U. S., 537, 545, that the course of business carried on by this company constitutes interstate commerce.

At the time of the indictment herein the company was operating a single system of street railways in Cincinnati, Covington, Newport and vicinity as appears upon a map opposite page 44 of the printed record, a copy of which is appended to this brief.

The particular line of the South Covington & Cincinnati Street Ry. Co. which is involved in this indictment is what is known in the record as the Erlanger or Fort Mitchell line, which appears on the left side of the

map. The history of its construction and operation is as follows:

In 1879, after the system of the South Covington Company had been in operation for more than 25 years, the Cincinnati, Covington & Erlanger Railway Co., hereinafter called the Erlanger Company, was organized under the laws of Kentucky by filing articles of incorporation, of which the third paragraph is as follows:

> "The business of said company shall be the construction, maintenance and operation of a line of railway, not exceeding ten (10) miles long, with a single or double track, and with all the usual and convenient appendages and appurtenances thereunto belonging, including the right to erect, maitain and operate electric poles and wires over and along said railway, and with the privilege of operating a line of telegraph or telephone on and over the line of said railway. Said railway is to be constructed and operated, from the City of Covington, Kenton County, Ky., to the town of Erlanger, in Kenton County, Ky., and to such further point beyond said town of Erlanger as may be hereafter determined upon, and over, along, and upon such bridges, streets, roads, highways and such private property, as said company may by due process of law, acquire the right to lay its tracks and other appliances and appendages upon." (R., 16.)

The town of Erlanger, referred to in the language just quoted, is 6.21 miles from Covington and 8.7 miles from Fountain Square in Cincinnati. As appears below, the line was never built all the way to Erlanger.

The original incorporators of the Erlanger Company were parties interested in the South Covington Company, which became the owner directly or indirectly of

all of the stock of the Erlanger Company, except the qualifying shares of the directors, and furnished the money to build the road. The South Covington Company has at all times retained its ownership of said stock. (R., 28.)

Without any formal agreement or arrangement between the two companies, the South Covington Company constructed the road and has operated its street cars thereon, although the corporate organization of the Erlanger Company has been at all times maintained. (R., 29.)

Shortly after the filing of the articles of incorporation, the track was constructed from a point 600 feet within the corporate limits of Covington at Montague street (where it connected with the then existing street railway tracks of the South Covington Company) to the Highland and St. Mary's Cemeteries, a distance of about 3.75 miles from Covington and was opened for travel in 1902. (R., 20.)

Shortly after the building of the road, the "Ft. Mitchell Country Club" built a club-house and laid out golf links at a point on the line between Covington and the Cemeteries, about three miles from Covington. (R., 34.) A town has grown up about the club and has been incorporated as the town of Fort Mitchell, which is purely suburban to Cincinnati, and has no place of business—not even a drug store or grocery—and no places of amusement, except the golf links. Its population is from 250 to 300. (R., 34.)

There are no other municipalities on the line, and not even a village at the end of the line.

In 1912 an additional mile was constructed from the cemeteries to a point on the Lexington Pike near the

intersection of Buttermilk Pike, making the total length of the line from Fountain Square in Cincinnati, Ohio, to the Buttermilk Pike, about six miles. (R., 20.)

The Erlanger Company did not construct, and never operated, the line. It never owned a power house or cars, or any other equipment. The only tracks constructed on its right of way were those built by the South Covington Company. (R., 20, 21.)

The only cars ever operated over the line were the street cars of the South Covington Company (R., 20-21), and at the time referred to in the indictment (as well as previously) all such cars were operated as a part of the South Covington Street Railway System and in the same manner, for the same fares, with the same transfer rights as on the other parts of the system. (R., 35 *et seq.*)

All cars were operated by continuous trip from Cincinnati to the end of the Ft. Mitchell line. (R., 30.) From Covington to the end of the line—a well populated territory (R., 38)—the cars stop at any road crossing to take on or let off passengers, just as in Newport, Covington and Cincinnati. (R., 37.) A flat fare of five cents is charged, wherever the passenger gets on and whether he rides the entire length of the line, or only to the next street or road crossing, being the same rate of fare as charged on all other parts of the South Covington system. (R., 31, *et seq.*)

The South Covington Company also gives universal transfers from any one of its routes or lines to any other, and the custom applies also to the Erlanger or Ft. Mitchell line. For instance, a passenger is carried from the end of the Ft. Mitchell line at Buttermilk pike to the end of the Ft. Thomas line for a single

five-cent fare, receiving two transfers in the process. Transfers are also given to and from all other lines of the company. (R., 31, *et seq.*)

The only cars used on the line were the regular single truck street cars of the South Covington Company (R., 28), seating thirty-two passengers, and about twenty-one feet in length, inside measurement, being interchanged every day with cars used on other lines of the system. There are no particular cars allotted to this line. (R., 38.)

All the regulations and customs with reference to the operation of cars, and the fares and transfers, in force on the other parts of the South Covington Street Railway system in Kenton and Campbell counties, apply equally to the Ft. Mitchell line. (R., 36.)

The mileage of the Ft. Mitchell route, and the receipts and disbursements thereon, are returned to the Auditor of Public Accounts by the South Covington Company as a part of its return. The assessment is made against the South Covington Company as a unit by the State Board of Valuation and Assessment, and the taxes are paid by the South Covington Company. (R., 36.)

The tangible property, such as the right of way and rails, is assessed by the local authorities, whereas in the case of all railroads and interurban roads, the tangible property is assessed by the Railroad Commission, and not by the local authorities. (R., 36-7.)

The State itself has thus treated the line as a street railway and not as an interurban line.

The company has never operated any freight cars over the line or carried any freight or express matter on its cars, nor has it ever done any business except the carriage of passengers for a five-cent fare, as above described. (R., 37.)

There are some expressions in the opinion of the court below which are, doubtless without intention, wholly misleading. For instance on page 53, the court says:

> "The operation of a train upon this road, while it may be extended into another state, by connecting it with, and operating it upon the track of another company, the fact yet remains, that it is operated, the entire length of the line of the Cincinnati, Covington & Erlanger Railway Company, in the state of Kentucky."

and on page 55 it says:

> "The evidence shows that railroad coaches were operated upon the railroad, without compliance with the requirements of the law, as to separate coaches, or separate compartments therein, and that such operation was by the South Covington & Cincinnati Street Railway Company."

There is no evidence that the South Covington operates either a "train," or a "railroad coach." The undisputed evidence is that the car upon whose operation this indictment is based, like all the other cars operated upon the line, was an ordinary single truck street car, doing an ordinary street car business between Cincinnati and the Kentucky end of the line.

The court below seemed to assume that because the legal title to the portion of the line from Montague Street to Buttermilk Pike is in an interurban company, the operation thereon must be deemed, for the purposes of the separate coach act, to be an interurban operation. The court said on page 54:

> "It can not escape its responsibilities as an interurban railroad, by claiming or undertaking to operate it as a street railroad, or authorizing

any one else to do so, because in the contemplation of the statute and the holdings of this court, exempting street railroads from the application of Section 795, *supra*, it is impossible to operate a street railroad upon its road. It is contended, that the South Covington & Cincinnati Street Railway Company is authorized by its charter to operate a street railroad upon the road of the South Covington, Cincinnati & Erlanger Railway Company but an examination of the charter does not seem to justify this contention, and if authorized to operate the line, not being a street railroad, it would be required to comply with the statute, in its operation."

If the question of the right of the South Covington Company to operate a street railway over the line in question were involved in this indictment, we contend that the record shows that right to be clear. The South Covington Company has ample power under its charter (R., 12), to extend the operation of its street railway line throughout "Covington *and vicinity,*" not only within, but "out of the city." The sections of its charter which we have quoted, give it power to "purchase, lease, consolidate with, acquire, hold or operate any other street railway or interest therein in Covington, Cincinnati, Newport or vicinity" (Sec. 3); "to connect with, and use the track of any other *railway company* in the city of Covington and vicinity," even by a resort to condemnation proceedings (Sec. 4); and to "purchase and hold such real and personal estate, routes, railway tracks * * * as may be deemed requisite for its use." (Sec. 6.) The South Covington & Cincinnati Company is therefore operating, in accordance with its legal rights, a street railway upon the tracks in question.

But the question here is not what kind of a railroad the company had a right to operate, but what kind it did operate. The right of the South Covington Company to operate its interstate street cars over the Ft. Mitchell line has never been challenged. Its street car service has been welcomed and has built up the region served. It has created the suburb of Ft. Mitchell. The proceeding below was not brought to require the companies, or either of them, to operate an interurban line or interurban cars, but to punish them for failing to maintain separate compartments or coaches for colored people on the street railway line and its cars actually in operation. We are not concerned with any imaginary operation, or some kind of operation which the plaintiffs in error could or should carry on. The question is whether the application of the Kentucky Separate Coach Law to the actual operation of the plaintiffs, is an unreasonable interference with or burden upon interstate commerce.

Furthermore, as we shall see, this law, even if applied to an interstate interurban road over the route in question, would be invalid.

THE SOUTH COVINGTON COMPANY ENGAGED IN INTERSTATE COMMERCE.

The record in this case shows that all the cars on the Ft. Mitchell line were operated by a continuous trip, for a single fare, in charge of the same crew, from Fountain Square or thereabouts in the City of Cincinnati, Ohio, to the end of the line in the State of Kentucky, at the Buttermilk Pike; also that this operation was carried on by the South Covington Company. (R., 30 *et seq.*, also 35.)

The particular car, No. 309, upon whose operation the Commonwealth based its proof of this indictment, was operated by continuous trip over the route just described.

It is also established by the record that of the passengers carried on the Ft. Mitchell line, 80% are carried between Cincinnati, Ohio, and some point in the State of Kentucky.

It is not necessary to argue that the South Covington System, this particular line and this particular car were engaged in interstate commerce.

The decision of this court in *South Covington & Cincinnati Street Railway Co.* v. *Covington*, 235 U. S., 537, disposes of this question.

THE SEPARATE COACH LAW A DIRECT AND UNREASONABLE REGULATION OF INTERSTATE COMMERCE.

The Separate Coach Law, as applied by the court below in this case, is a direct and unreasonable regulation of Interstate Commerce.

Every car on the line in question is an interstate car and eighty per cent. of the passengers are interstate passengers. The particular car, No. 309, upon whose operation the indictment and conviction are based, was an interstate car. In any event, the law as applied by the court below, would require a separate coach or compartment on any interstate car operated on the Fort Mitchell line, even if separate local facilities had been furnished on the line.

In *South Covington & Cincinnati St. Ry. Co.* v. *Covington*, 235 U. S., 537, the court had under consideration an

ordinance of the City of Covington which regulates the number of passengers to be carried on the cars of the Street Railway Company; the number of cars to be operated and the temperature to be maintained on the cars. It was held that the cars were engaged in interstate commerce and therefore that the ordinance was in violation of the Federal Constitution. The court said on page 547:

> "If Covington can regulate those matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall* v. *DeCuir*, 95 U. S., 485, 489, 'commerce can not flourish in the midst of such embarrassments.'"

So in the case at bar, if Kentucky can regulate these matters so can Ohio. As a matter of fact it so happens that Ohio has a statute which is inconsistent. Sec. 12940 of the General Code of Ohio is as follows:

> "Whoever, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber-shop, public conveyance by land or water, theater or other place of public accommodation and amusement, denies to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, or being a person who aids or incites the denial thereof, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not less than thirty days nor more than ninety days, or both."

In *Hall* v. *DeCuir*, 95 U. S., 485, a statute of Louisiana required all common carriers in that state to give all persons traveling in that state equal rights and privileges in all parts of the conveyance by which the travel was conducted, without distinction on account of race or color. Defendant's intestate was the owner of a steamboat plying between New Orleans, La., and Vicksburg, Miss.; plaintiff was a person of color traveling from New Orleans to Hermitage, both within the state of Louisiana, who was refused accommodations on account of her color in the cabin specially set apart for white persons. She sued for damages under the above mentioned statute and recovered a judgment. Defendant claimed that the statute was void as to him, in respect to the matter complained of, because it was an attempt to "regulate commerce among the states." This court held that it was such an attempt and reversed the judgment.

The court said on pp. 488, 489:

> "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, can not but af-

> fect in a greater or less degree those taken up without and brought within and sometimes those taken up and put down without."

Also on page 489:

> "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce can not flourish in the midst of such embarrassments."

In *Cleveland, Cincinnati, Chicago & St. Louis Railway Co.* v. *Illinois,* 177 U. S., 514, the court held unconstitutional a statute of Illinois requiring every railroad corporation to stop all regular passenger trains at county seats. It was suggested in support of the law, that the statute being operative only in the state of Illinois did not directly affect interstate commerce, but the court said on page 522:

> "While the statute in question is operative only in the state of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall* v. *DeCuir,* 95 U. S., 485, that 'while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. * * *

> If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others.' The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and draw-bridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion."

In *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S., 388, the Railroad Company was indicted in the Kentucky courts under the statute here involved for a failure to furnish a separate coach or compartment for colored people. There was a conviction and an appeal to the Court of Appeals which held, 21 Ky. Law Rep., 228, following its decision in *Railroad Company* v. *Lander*, 20 Ky. Law Rep., 913, that the law applied only to transportation within the state. On error to this court, it was held by this court that in view of the construction put upon the law by the Kentucky Court of Appeals, the law was not a regulation of interstate commerce.

The court said (179 U. S., 390).

> "Of course, this law is operative only within the state. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville,

Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the state. The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the state, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches when traveling from or to points in other states."

In the case at bar, however, the application of the law by the court below, to the facts of this case makes it a regulation of interstate commerce and it is therefore in violation of the Federal Constitution.

The conditions under which the street railway operates, its short trips, the preponderance of interstate passengers, the other circumstances set forth in the record and the incidents common to all street railway operation, differentiate this case from the Chesapeake & Ohio case, and preclude the application to this case of the observations made by the court in the language just quoted. It would not be practicable for this company to attach or detach a separate coach at the state line, or to otherwise comply with the law without directly affecting the travel of its interstate passengers.

(a) It would be impracticable to attach to the interstate cars, when they reach the Kentucky side of the state line, an additional car, and to detach it when reaching that line on the return trip. The state line itself is crossed on the Suspension Bridge. The territory near the bridge is in the heart of the business and residence

district of Covington. The maintenance of the necessary yards and side tracks for such purpose and in such place would be an unreasonable burden, in view of the facts that the entire trip from Cincinnati to the end of the line is only about six miles; eighty per cent. of the travel is interstate; not over six per cent. of the passengers are colored and on many trips there are no colored passengers; the very essence of street car travel is speed, cars at frequent intervals, and low fares. The attachment of an additional car, in the midst of a six mile continuous trip, for the accommodation of the inconsiderable proportion of the small percentage of intrastate passengers would be an intolerable burden—financially and from the standpoint of operation—upon the normal and desirable street car traffic.

In the case of a steam railroad, with the interstate trains making long journeys; with trains always composed of several cars; with engines always having capacity to draw additional cars; with cars of sufficient length to make the establishment of separate compartments easy; with stations or junction points near the state line where there are facilities for the change or addition of equipment, the situation is entirely different.

The State of Kentucky has recognized the essential differences between street railway and other railway traffic, because it does not require separate coaches or compartments for colored people on even intra-state street railways. Yet the courts of Kentucky have so construed the law as to impose that requirement on this street railway line, because a part of the right of way traveled by the street cars belongs to the Erlanger Company, which the court has held is an interurban company.

(b) If the separate coach or compartment were furnished, it would in practice directly affect interstate travel.

Suppose the case of a separate car or compartment, when the car starts at the Cincinnati terminus. Any colored passenger getting on the car in Cincinnati was either a local passenger in Cincinnati or an interstate passenger, and, of course, could not be assigned to the separate car or compartment in Ohio; hence such separate car or compartment would be idle until arrival in Kentucky. In street car traffic both economy of operation and the demand for maximum capacity, especially in the rush hours, forbid waste or idle space. In the case of a colored passenger getting on a car in Kentucky for the interstate trip, assignment to a separate coach or compartment would be illegal. Yet there is no practicable way of distinguishing between interstate and intra-state passengers. Such passenger would not buy a ticket for any given station, thus indicating his destination, and permitting segregation in case of an intrastate passenger. The passenger pays a nickel and rides as far as he likes.

The only practicable course for this company to meet the requirements of this law as interpreted in this case, would be to abandon its interstate cars, and the State of Kentucky has no right to require this.

(c) The Erlanger or Fort Mitchell line is operated, and necessarily so, as a part of the general street railway system operated by the company. The cars used on that line are also used on other parts of the line and are freely exchanged back and forth; they are simply the ordinary street cars of the company assigned from time to time to this particular line. Universal transfers

are given to other lines in the system; the same fare is charged and the business of the line is not confined to the carriage of passengers to and from points on the Ft. Mitchell line outside of the City of Covington, but extends to the carriage of passengers between Cincinnati and points in Covington along the route followed by the line in question. In other words, the line does not differ in any respect from any other part of the system and the company's right to so operate has never been questioned, yet the application of the separate coach act in this case is to require separate compartments or separate coaches on a particular part of the street railway system, and not to require it on the other and greater part of the system where the conditions are exactly the same, so far as equipment and operation are concerned.

In emphasizing the difference between the line actually operated by the South Covington Company and an interurban line, we do not mean to concede that the law would be valid if applied to the operation of an interurban car over the same route as is here involved. We think that in the main the same considerations would apply. But we have—perhaps in too great detail—shown that the actual operation here is a street railway operation, because we desire the court to consider this case upon the facts as they actually are, and not upon the theory apparently adopted by the Court of Appeals of Kentucky that the case deals with an interurban line.

We have shown that the application of the law in this case is wholly different from the application which was

made and upheld by this court in the case of *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S., 388, *supra*.

We have cited authorities hereinabove on the proposition that the question whether the statute is an invalid regulation of interstate commerce will be determined by this court upon the application of the statute made by the state courts to the facts in a particular case and that the law might escape condemnation as applied in one case, such as *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, above, and yet be held to be a violation of the commerce clause of the Federal Constitution as interpreted and applied in another case, such as the case at bar.

THE CASE OF THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY.

While the indictment against the Erlanger Company accuses it of the offense of unlawfully operating a line of railroad without providing separate coaches or compartments for colored people, the specifications in the indictment (R., 758, p. 1, *et seq.*) charged only that it leased its road to the South Covington Company with knowledge that the latter company would operate it without such separate coaches or compartments.

The evidence shows (R. 757, p. 20, *et seq.*) that the Erlanger Company never had any cars or power house, never operated any cars of any kind over its tracks, and that the only cars ever operated over those tracks were the cars of the South Covington & Cincinnati Street Ry. Co., to which we have already referred in detail.

The indictment and conviction of the Erlanger Company is upon the theory set forth in the opinion of the

court below on page 55 of the record in the South Covington case, No. 757, as follows:

> "The evidence is, also, such as to prove, that the Cincinnati, Covington & Erlanger Railway Company, either turned over its road to the Street Railway Company, with full knowledge that it would be operated contrary to law and for the purpose of the road being so operated, or else the two companies are jointly engaged in the operation of the railway. In either event it being conclusive, that the operation is being unlawfully made by the authority of the Cincinnati, Covington & Erlanger Railway Company. Under the facts proven, it is impossible to conclude, that the road is being unlawfully operated, without the full concurrence of the latter company, and it is therefore amenable to penalty, which is denounced in the statute."

Obviously the judgment against the Erlanger Company could not stand if this court should reverse the judgment of the court below in the South Covington case. If the South Covington Company had a right to operate its interstate cars as it did, without separate accommodations for colored people, the Erlanger Company can not be punished for merely consenting to or acquiescing in such operation.

We respectfully submit that the judgment in each case should be reversed.

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Frank W. Cottle,
Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 252.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO.

vs.

COMMONWEALTH OF KENTUCKY.

No. 253.

CINCINNATI, COVINGTON & ERLANGER RAILWAY CO.

vs.

COMMONWEALTH OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

The Court of Appeals of Kentucky did *not* hold or intimate that the South Covington Co. was without charter power to operate its interstate street cars over the right of way of the Erlanger Company, and that therefore separate coaches or compartments could be required on the Erlanger road regard-

less of their effect upon such interstate commerce. The charter powers of the two companies were not discussed or mentioned in connection with the interstate commerce or Federal question.

The only reference to the charter power of the South Covington Co. was in answer to our contention that the charter of that company authorized it to operate a street railway line over the Erlanger right of way; that it did operate such a line, and that therefore the separate-coach law, which did not apply to street railroads, did not apply to it. The court said (page 54 in R. 252):

> "It (the Erlanger Co.) cannot escape its responsibilities as an interurban railroad by claiming or undertaking to operate it as a street railroad or authorizing any one else to do so, because in the contemplation of the statute, and the holdings of the court, exempting street railroads from the application of section 795, *supra*, it is impossible to operate a street railroad upon its road. It is contended that the South Covington and Cincinnati Street Railway Company is authorized by its charter to operate a street railroad upon the road of the Erlanger Railway Company, but an examination of the charter does not seem to justify the contention, and if authorized to operate the line, not being a street railroad, it would be required to comply with the statute in its operation."

This only means that whatever was operated over the Erlanger right of way would be assumed or construed to be a so-called interurban operation referable to the Erlanger charter, and therefore within the operation of the separate-coach law under section 842 A. (See our main brief, page 17.)

Even if the court had held, which it did not, that the

operation of street cars over the Erlanger right of way was without charter authority, such operation, as long as permitted, could not be deprived of the constitutional protection of the interstate commerce clause.

In the Detroit Street Railway case recently decided by this court, it was held that where the franchises had expired, and the city had a right to expel the street railway from the streets, the city could not, while it permitted the street railway to be operated on such streets, impose confiscatory rates of fare.

An analogous principle is to be found in C., B. & Q. R. R. *vs.* R. R. Commission of Wisconsin, 237 U. S., 220, where the court holds that an unlawful interference with interstate commerce cannot be defended as an amendment by the State of the corporate charter of the railroad company.

Turning to another subject, Chiles *vs.* C. & O. R. R., 218 U. S., 71, merely holds that a railroad may adopt a rule segregating its colored interstate passengers. It does not hold that a State law may require it to do so. In effect it holds to the contrary, on page 75.

In the absence of Federal legislation on the subject, the carrier is entitled to decide this question for itself in accordance with the facts or needs of the particular situation.

Respectfully submitted.

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FRANK W. COTTLE,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error,

No. 252. *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,
Plaintiff in Error,

No. 253. *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

Reply Brief for Plaintiffs in Error.

We can not properly deal with these cases as if they involved the operation of an interurban line by the Erlanger company between Montague street in Covington, Kentucky, and Buttermilk Pike, four miles distant, also in Kentucky, and as if the cars of such interurban line

ran to Cincinnati by some arrangement with the South Covington & Cincinnati Street Railway Company.

The Erlanger Company did not own or operate any cars. The car upon whose operation this indictment and conviction were based, was a street car of The South Covington & Cincinnati Street Railway Company, operated as a part of the street railway system of that Company and making continuous interstate trips between Fountain Square in Cincinnati, Ohio, and the Buttermilk Pike, back of Covington, in Kentucky. The Statute (Sec. 795) applies only to Companies "operating" railroad lines or railroad cars, and the Erlanger Company, though not operating, was held by the court below to be guilty, because, as the owner of the right of way between Montague street and Buttermilk Pike, it was held to have consented to the alleged illegal operation, or to be jointly engaged therein with the Street Railway Company.

The proper way to approach these cases, therefore, is to determine first whether the application of the statute to the operation of the street car of the South Covington & Cincinnati Street Railway Company was in violation of the commerce clause of the Federal Constitution.

In considering this question, we must take the statute as a whole and assume that if the street railway company is required to furnish separate compartments for colored people, under Section 795, it will also be required to assign passengers thereto according to their color, under Section 799, which is a part of the same Act. It would be idle and futile to ignore the purpose and legal

consequences of requiring separate compartments, in determining whether such requirement is a burden on the interstate commerce described in this record.

While this indictment is not based upon an alleged violation of Section 799 requiring the segregation of passengers, but upon Section 795 requiring a separate compartment, the question whether the requirement of a separate compartment is a burden upon interstate commerce depends very definitely upon the use which the statute requires shall be made of it.

Let us assume as does our opponent, that the State of Kentucky can not require us to assign interstate passengers to the separate compartments. In view of the fact that eighty per cent. of the travel on that line is interstate, that not more than six per cent. of the whole travel is colored, and on many trips there are no colored passengers at all, we contend that the requirement to furnish separate compartments which would be seldom used, and would for the most part be wasted space, is of itself an undue burden upon interstate street car travel, where economical operation and the maximum of capacity, especially at rush hours, are required.

But an even more serious objection is to be found in the difficulties and complications which the very presence and maintenance of such separate compartments would produce in the conduct of the interstate business to which the line is principally devoted. Many of these difficulties are pointed out in our main brief, pp. 24 *et seq.*

Counsel for the state seem to realize the seriousness of these difficulties, for they seek to dispose of them in the following way, pp. 23 and 24 of this brief:

> "So far as this prosecution is concerned, there would be no violation of the law if this particular car in question had had the white compartment filled in Cincinnati with passengers of color, and the colored compartment filled in the same city with white passengers, and had permitted these passengers to ride through to the end of the line, if at the same time it had merely provided separate compartments designating the races to occupy them. In other words, it seems to us that all the inconveniences and burdens suggested by counsel in their brief arise from a conception that the prosecution is based upon a violation of the law of Kentucky requiring the company through its agents to assign the passengers. If this misconception is eliminated, and the fact merely is considered that the law simply requires the company to furnish separate compartments or coaches without reference to the duty of the company through its agents, to separate the races, all difficulties, it seems to us, disappear."

Of course the difficulties "disappear" in part at least if we assume after separate compartments are built and designated by signs, they will be occupied and used indifferently by white and colored people without separation. But we can not assume this in face of the plain requirement of the law as found in Section 799 of the same act.

But we must assume that the State of Kentucky will require the separation of Kentucky intrastate passen-

gers according to their color, and we contend that the burdens and difficulties of such requirement, and the maintenance of separate cars or compartments for that purpose are an unlawful burden on the interstate commerce described in the record.

As counsel for the State point out in their language above quoted, a car leaving Cincinnati might have white passengers in the colored compartment and colored passengers in the white compartment. If a colored passenger were taken into such car when it reached Kentucky and were assigned, as the law would require, to the colored compartment, when there were white people therein, or when other colored people were in the white compartment, the process would be a farce and would be attended with constant difficulty and danger of race antagonism and disorder.

As we have shown in our main brief, a still greater difficulty would be met on the northbond trips. A passenger boarding a northbound car is usually an interstate passenger, but there would be no way of ascertaining whether he was or not. Neither this street railway nor any other sells tickets for given stations. The passenger pays a flat fare of five cents, and rides as far as he likes. A colored passenger boarding a northbound car for a local trip, could easily declare himself bound for Cincinnati, thus evading assignment to the colored compartment, and then leave the car when he reached his real intrastate destination.

The suggestions made by opposing counsel as to practical methods of compliance with the law do not meet the difficulties.

Counsel say on page 25 of their brief:

> "It might, if it deems it more convenient to do so, operate its cars over the right of way of the Cincinnati, Covington & Erlanger Railway Company, to the terminus in Covington, on Montague street, or attach a separate car and there transfer its passengers to cars operating on the tracks of the South Covington & Cincinnati Street Railway Company."

If we understand this language it contains two suggestions.

First, that the south bound cars when they reach Montague street should take on another car for colored passengers and leave it on Montague street on the return trip. Aside from the burden of furnishing an additional car for an inconsiderable colored patronage for the very short distance involved, the suggestion is not practicable. The state could not require the interstate colored passengers to be transferred to such a car at Montague street, and any attempt to distinguish and transfer to such a car on reaching Montague street the colored passengers who had been taken up prior to that time within the State of Kentucky would be attended with obvious difficulties and complications. On the return trip from the southern terminus of the Erlanger line there would be the same difficulty of distinguishing between interstate and intrastate passengers to which we have already referred.

Second. The language quoted seems to contain the suggestion, which is also to be found on page 31 of the brief for the Commonwealth, that all passengers should be transferred at Montague street, that is to say, that the use of interstate cars on that part of the line should be abandoned.

As we have indicated in our main brief, that is what the enforcement of this law would probably mean in the case of this company, and the State of Kentucky has no right to bring about such a result, that is, to destroy, in the practical enforcement of its separate coach law, the continuous operation of interstate cars on this line.

It is not at all certain, however, that even such transfer of passengers and abandonment of interstate cars would avoid the embarrassments produced by the enforcement of this law, if any form of continuous trip, such as a single fare or a transfer, were retained. An interstate passenger boarding a car at either end of the line would be an interstate passenger for the entire trip, even though the trip were broken by a transfer to another car or were accomplished by the co-operation of two separate companies.

Louisiana R. R. Commission v. *T. & P. Ry. Co.*, 229 U. S., 336.
Railroad v. *Seale*, 229 U. S., 156.

This court in deciding the case of *Chesapeake & Ohio Railway Co.* v. *Kentucky*, 179 U. S., 388, recognized that an interstate carrier could not be required to furnish a separate coach or compartment unless there was some

practicable way in which the same could be reasonably utilized in compliance with that portion of the law which required the separation of colored passengers.

The court said on page 390:

> "Of course, this law is operative only within the state. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the state."

The distinction between the facts in that case and the facts in this case have already been pointed out.

We have shown the impracticability of attaching a separate car to the interstate car after it crosses the state line and in the midst of a trip whose total length is six miles.

In the case of a steam railroad with the interstate trains making long journeys, with trains always composed of several cars, with engines always having capacity to draw additional cars, with cars of sufficient length to make the establishment of separate compartments easy, with passengers automatically classified by their purchase of tickets, with stations or junction points near the state line where there are facilities for the change and addition of equipment, the situation is entirely different.

We submit that a state statute or regulation which operates upon interstate commerce, or which is interpreted by the state in such a way as to make it operate on interstate commerce is on the defensive, so to speak, and to be upheld it must be entirely and affirmatively reasonable.

The regulation of interstate commerce is the domain of the Federal Government. A state statute which, as interpreted in a given case, regulates or burdens interstate commerce does not have the presumption in its favor which attends public regulations in general.

In *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S., 186, this court upheld the validity of the Carmack Amendment, a federal enactment, making any common carrier receiving property for interstate transportation over its own and another line, liable for any loss or damage by the connecting carrier. It was claimed that the law was arbitrary and unreasonable and therefore beyond the power of Congress, but the court held that it was within the power of Congress under the interstate commerce clause of the Constitution.

In *Central Georgia* v. *Murphy,* 196 U. S., 134, a similar law of the state of Georgia, which was not so rigorous as the Carmack Amendment, was held, when applied to interstate commerce, "not a reasonable regulation in aid of interstate commerce but a direct and immediate burden upon it."

The freedom from interference by state laws, to which interstate commerce is entitled, is not merely freedom

from regulations of confiscatory or oppressive character; it is entitled to freedom from any substantial interference. As this court said in *Welton* v. *Missouri*, 91 U. S., 292, it is entitled, in the absence of action by Congress, to "remain free and untrammeled."

In *Ill. Central R. Co.* v. *Illinois*, 163 U. S., 142, 154, the court said:

> "The state can do nothing which will directly burden or impede the interstate traffic of the company, *or impair the usefulness of its facilities for such traffic.*" (Italics ours.)

This language was quoted with approval in *Kansas City S. R. Co.* v. *Kaw Valley Drainage District*, 233 U. S., 75.

We submit that the separate coach act of Kentucky as applied in this particular case, imposes a serious burden upon the operation of the interstate cars, and upon interstate commerce; that it violates the Commerce Clause of the Federal Constitution; and that the judgments herein should be reversed.

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Alfred C. Cassatt,
Frank W. Cottle,
Attorneys for plaintiff in error.

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LIST OF CASES

Supreme Court of the United States

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error,

No. 252 *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,
Plaintiff in Error,

No. 253 *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief for Defendant in Error.

STATEMENT

These are proceedings in error to reverse the Court of Appeals of Kentucky, which affirmed judgments of the Kenton Circuit Court, overruling demurrers to indict-

ments brought against plaintiffs in error, for a violation of the separate coach law of Kentucky.

The Cincinnati, Covington & Erlanger Railway Company is a corporation organized under the general railroad laws of Kentucky. *The South Covington & Cincinnati Street Railway Company* is a corporation created by a special act of the Kentucky Legislature, and authorized to operate a street railway. The date of the charter of the *Cincinnati, Covington & Erlanger Railway Company* is September 18, 1899. Very shortly thereafter, this company, by virtue of its charter, proceeded to condemn for railroad purposes, a right of way between the western boundary line of Covington, Kentucky, and a point about three miles Southwest of Covington. Afterwards the same company, acting under its powers as a railroad company to condemn land, extended its line of railway to a point near the Buttermilk Pike, about four miles from the western boundary line of Covington.

The South Covington & Cincinnati Street Railway Company was, during this period, operating its line of railway in the City of Covington, and into the adjoining cities of Newport, Kentucky, and Cincinnati, Ohio. It owned a power house, rolling stock and all the necessary equipment for the operation of a line of electric railway. There was at this time, a practical identity of directors and officers of both companies (Record Case 757, Pp. 21-27). When the road of the *Cincinnati, Covington & Erlanger Railway Company* was completed, the *South Covington & Cincinnati Street Railway Company* connected its tracks with the terminus of this company in Covington and began to operate its cars over the road. So complete was the identity of the personnel of the two companies, that

apparently no formal contract was made between them with reference to this operation. At all times there existed a common treasury, common officers and offices, the only distinction between the two companies being that each maintained a separate corporate existence.

By separate indictments, plaintiffs in error were charged with the violation of Section 795 of the Kentucky Statutes, which requires railroad companies, or other corporations or persons operating a railroad car, or coaches, by steam or otherwise, within the State to furnish separate coaches or cars for white and colored passengers, and which further provides that each compartment of a coach divided by a substantial wooden partition shall be deemed a separate coach within the meaning of the act.

In the Circuit Court, where both cases were heard together, a verdict of guilty was returned against both companies and upon appeal the Court of Appeals affirmed both judgments (Case 757, Assignment of Errors, Rec., Pp. 56).

It was contended that the Statute of Kentucky as applied to the facts in this case, was an unlawful and unreasonable interference with interstate commerce, in violation of the federal constitution. (Case 757 Rec., Pp. 7, 44.) This defense was decided by the Kentucky Court of Appeals, adversely to plaintiffs in error.

While the same facts are involved in both appeals, we think it more logical to first discuss the indictment against the *Cincinnati, Covington & Erlanger Railway Company*, upon whose guilt depends the guilt of the *South Covington & Cincinnati Street Railway Company*.

It will be noticed that the charter of the *Cincinnati, Covington & Erlanger Railway Company* authorizes it to

construct, maintain and operate a line of railway "not exceeding ten miles in length" (Case 757 Rec., Pp. 16.), "from the City of Covington, Kenton County, Kentucky, to the Town of Erlanger, in Kenton County, Kentucky, and to such point in said Town of Erlanger as may be hereafter determined upon." (Case 757 Rec., Pp. 17.). The charter is the usual railroad charter.

In 1902, Sec. 842-a, paragraph 1, of the Kentucky Statutes was enacted. This Section is as follows:

> Section 842-a. 1. Interurban electric railroads placed on same footing as railroads. All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, so far as practicable, and shall have the same rights, powers and priviliges as *is* now granted to or conferred upon railroad, corporations existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted.

Evidently the author of the Section had in mind the peculiar provisions of the charter of the *Cincinnati, Covington & Erlanger Railway Company*, for this company was in fact "an interurban electric railroad" company "authorized to construct a railroad ten miles in length," and "incorporated under the general railroad laws" of the Commonwealth of Kentucky.

THE LAW

The indictment was had under Sections 795 to 798, of the Kentucky Statutes, which are as follows:

Section 795. *Separate coaches or compartments for white and colored passengers.* Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line or track within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State, and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for travel or transportation of the white and colored passengers, on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

Section 796. *No discrimination in coaches or compartments.* That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

Section 797. *Misdemeanor-Penalty.* That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of Sections 795 and 796 shall be deemed guilty of a misdemeanor, and, upon indictment and conviction thereof, shall be fined not less than five hundred nor more than one thousand five hundred dollars for each offense.

Section 798. *Jurisdiction of circuit courts.* That all circuit courts in which railroads are operated in this State shall have complete jurisdiction over such offenses.

Counsel for plaintiffs in error have incorporated in their brief Sections 799 to 801 of the Kentucky Statutes, which make it the duty of the person in charge of trains to assign white and colored passengers to their separate coaches or compartments, and providing a penalty for his failing to do so.

This is not a proceeding against the conductor of a railroad company for a violation of the law requiring the company, through its agents, to assign passengers to coaches or compartments, set apart for persons of their race. It is a proceeding against the companies for failing to provide, within the Commonwealth of Kentucky, coaches or compartments of equal convenience and accommodation for white and colored passengers. We assume that the distinction is apparent. Conceding for the purpose of the argument, that the car mentioned in these indictments, and described in the proof, was an interstate car, it might be said that an attempt to compel the company, through its agents, to assign interstate passengers to separate compartments, as soon as the car crossed the boundary line between Kentucky and Ohio, would be an unlawful and unreasonable burden upon interstate commerce. We are not concerned with that proposition at this time, however, because this Court has frequently held, even with reference to interstate carriers, that it is no unlawful and unreasonable burden upon interstate commerce, to require the carrier, while operating its train or cars between two points, within the State.

to furnish suitable and convenient separate compartments for the use of the white and colored races.

The Commonwealth has not considered it important to determine whether Section 795 to 798 would apply to the plaintiffs in the absence of Section 842-a, paragraph 1, or whether the enactment of Section 842-a, paragraph 1, of the Kentucky Statutes was necessary to bring the *Cincinnati, Covington & Erlanger Railway Company* within the operation of the separate coach Statute. As a matter of fact, we would contend that if Sec. 842-a, paragraph 1, had not been enacted, the *Cincinnati, Covington & Erlanger Railway Company*, being a railroad corporation organized under the general railroad laws of the Commonwealth, would have been subject to the operation of the separate coach Statute. Certainly, however, under one of the Statutes, or both, the *Cincinnati, Covington & Erlanger Railway Company*, is subject to the separate coach law. It is conceded that the foregoing Statutes do not apply to a street railway. The Court of Appeals of Kentucky has held however, in *Louisville Railway Company v. Commonwealth*, 130 Kentucky, page 738, that the separate coach law applies to a street railway company leasing and operating interurbans.

THE INDICTMENTS

The indictment against the *Cincinnati, Covington & Erlanger Railway Company* is to be found on pages 1-4 inclusive, of the record, in case No. 758, and charges the company with operating a line of railroad within the Commonwealth of Kentucky, and Kenton County, without providing separate coaches or compartments for white

and colored passengers. It charges that the company was incorporated under the general railroad laws of the State, and authorized to construct a line of railroad ten miles in length in the County and State aforesaid. That it had leased its rights and privileges to, and brought about the acquisition of its rights and privileges by the *South Covington & Cincinnati Street Railway Company*, to operate its line of railroad, with the knowledge that the *South Covington & Cincinnati Street Railway Company* would not operate and run separate coaches, or provide separate compartments for its white and colored passengers. That the *Cincinnati, Covington & Erlanger Railway Company*, by virtue of its acquisition of these rights by defendant company, knowing the intended method of operation by the *South Covington & Cincinnati Street Railway Company*, did, in February, 1915, operate a line of railroad and run a railway coach on its line of railroad, between two points in Kentucky, one being in the City of Covington, and the other being at a point near the Buttermilk Pike, without having provided separate coaches or compartments for white and colored passengers.

The indictment against the *South Covington & Cincinnati Street Railway* is to be found on pages 1-3 of the record in case No. 757, and charges that the *Cincinnati, Covington & Erlanger Railway Company* is an interurban railway company, authorized to construct a line of railroad ten miles in length, within the State of Kentucky, and incorporated under the general railroad laws of the Commonwealth of Kentucky. That the *South Covington & Cincinnati Street Railway Company* acquired the rights and privileges of the *Cincinnati, Covington & Erlanger Railway Company* to operate said line of railroad between

two points in Kenton County, Kentucky, and did run, operate and control the line of railroad of the *Cincinnati, Covington & Erlanger Railway Company*, and did operate a railway coach or car between two points in Kentucky, to-wit: One in the City of Covington, and the other on the Lexington Pike near the Buttermilk Pike, without providing a separate coach or compartment for white and colored passengers.

CLAIM OF PLAINTIFFS IN ERROR.

Under this heading, counsel for plaintiffs in error have called the Court's attention to and laid some stress upon the fact that the car mentioned in the proof was an interstate car, operated by the *South Covington & Cincinnati Street Railway Company*, a street railway company. We think this proposition not important if it was operating this car for a railroad company and over a railroad line. The *Cincinnati, Covington & Erlanger Railway Company* is organized under the general railroad laws of the Commonwealth of Kentucky, subject to all the railroad laws of the Commonwealth, and this has been held by the Court of Appeals of Kentucky upon more than one occasion.

In the case of *Devou v. Cincinnati, Covington & Erlanger Railway Company*, reported in 128 Ky. 768, this Court held that:

> Appellee is a railroad corporation organized under the laws of Kentucky for the purpose of constructing and operating an electric railway from Covington to Erlanger and other points beyond, not exceeding ten miles in distance, from Covington.

It was claimed by Devou, as the company now claims, that the *Cincinnati, Covington & Erlanger Railway Company* was a street railway company. On this proposition, the Court said:

> It only remains to be determined whether appellee is a railroad that may condemn land as provided by Section 835 Ky. St. 1903. It will hardly be questioned that appellee's articles of incorporation authorize it to construct and operate a railroad, and to that end to run over, along, and upon "such bridges, streets, roads, highways, and such private property, as such company, may by due process of law, acquire the right to lay its tracks and other appliances and appendages upon." While the term "railroad," as used in Section 835, Kentucky Statute 1903, has not been construed by this Court, we are clearly of opinion that the word "railway" has the same meaning. The words "railway, transfer, belt line," and "railway bridge companies," are used in Sections 214, 215 and 216 of the Constitution; and this Court has held that the provisions of Section 216 of the Constitution embrace street railroads as well as steam railroads. The language of that section is as follows: 'All railway, transfer, belt line and railway bridge companies, shall allow the tracks of each other to unite, intersect and cross at any point, where such union, intersection and crossing is reasonable or feasible.' In passing upon the question of whether a street railway in process of construction between Ashland and Catlettsburg, a distance of four miles should be allowed to cross a steam railroad at grade in Ashland as provided by Section 216, Const., this Court said: 'It is urged, however, that the appellee (street railway) is not a railway company in the meaning of the section of the Constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use steam, horse or other propelling

> power on said car route in the transportation of freight and passengers.' *Elizabethtown, etc., Railroad Co. v. Ashland, etc., Street Railway Co.*, 96 Ky. 347, 26 S. W., 181; *Johnson's Admr. v. Louisville City Railway Co.*, 10 Bush., 231; *L. & N. Railroad Co. v. Bowling Green Railway Co.*, 110 Ky. 788, 63 S. W. 4. The appellee railway, like the Ashland Railway Company mentioned in the case, supra, is of the class indicated by Section 216 of the Constitution, as it is to connect two cities, may carry freight, as well as passengers, and use steam instead of electricity, steam being one of the 'improved' methods of rapid transit.' While appellee's cars pass through Covington to Cincinnati and return, its railway is not, strictly speaking, a street railway, but rather an interurban electric railway, which is, or may be, operated a distance of ten miles from Covington and beyond Erlanger.

In the case of *Commonwealth v. Louisville & Eastern R. R. Company*, 141 Ky., 583, the Court of Appeals of Kentucky reversed a holding of the Circuit Court that Section 786 of the Kentucky Statutes, providing that a bell must be rung, or whistles sounded at crossings, did not apply to electric railways.

The Court said:

> We cannot agree with this view of the case. A locomotive engine is not necessarily a steam engine. Any engine used in producing motion, whether it be by steam or electricity, is a locomotive engine within the meaning of the Statute. Furthermore, Section 842-a was intended to bring interurban electric railroad companies under the law governing railroad corporations generally, both as to duties and rights, insofar as it was practicable to do so. The statute recognized the fact that there might be some instances in which regulations originally applicable to steam railroads could not be made practicable in all respects and applied to electric railroads. But

this condition was expressly provided for by the language of the statute which made such regulation apply to electric railroads, so far as it was practicable. If the regulation is capable of being complied with by an interurban electric railway company with its available means or resources, either in whole or in part to that extent it is practicable and must be complied with. And in determining the question of the practicability of the regulations, we are not to be restricted to a consideration of instruments or methods identical with those specified in the statute originally applicable to steam railroads; for if any substitutes or improvements in locomotive engines have been adopted to accomplish the same general purpose of the engine, the company must still obey the regulation in so far as the new condition made it practicable. It could scarcely be contended that a railroad company which had heretofore propelled its engine by steam could avoid the provisions of Section 786 supra, by changing its motive power to electricity.

In the case of *Louisville Railway Company v. Commonwealth*, and *Louisville Interurban, etc. v. Commonwealth*, 130 Ky., 738, to which reference will again be made, it was held that an interurban company is required to furnish separate coaches.

The offense charged in the indictments is the failure to furnish separate coaches or compartments between two points in Kentucky. The fact that the *Cincinnati, Covington & Erlanger Railway Company* permits another company, the *South Covington & Cincinnati Street Railway Company*, to operate cars beyond these points, and into another state, can not be relied upon by the plaintiff in error to escape liability. Neither is it material that the cars operated at the time the record was made in the Kenton Circuit Court, were, as suggested by counsel, in

their brief, about 21 feet in length. The Court knows at the present time that many street railways and interurbans operate large double truck cars nearly approaching in size the coaches used by steam railroads a few years ago. Neither is it material and the Court below so held that 6% of the passengers carried were colored, and that on a large number of trips no colored persons were carried. (*C. & O. R. R. Co. v. Commonwealth; L. & N. R. R. Co. v. Commonwealth*, 171 Ky. 355), 119 Ky. 519. If there were something in the charter of the *South Covington & Cincinnati Street Railway Company* which required it to operate a single truck car, seating only 32 passengers, and preventing it from operating large double truck cars with trailers, it might be conceded for the purpose of the argument, that the prosecution for failure to partition off these small cars would be an unreasonable interference with interstate commerce. In this case the law would be complied with, however, if the *South Covington & Cincinnati Street Railway Company*, at the point near the western boundary line of Covington, where it connects with the tracks of the *Cincinnati, Covington & Erlanger Railway Company*, would attach a trailer, so that separate coaches would be provided while the operation was over the tracks of the *Cincinnati, Covington & Erlanger Railway Company*.

The Court of Appeals held not as counsel states, that the *Cincinnati, Covington & Erlanger Railway Company*, was "theoretically" an interurban line, but that it was actually and properly an interurban line, within the meaning of the separate coach act. The Court held further:

"It is very clear that the *Cincinnati, Covington & Erlanger Railway Company*, being an interurban railroad, with authority under its charter to build electric railroad, ten miles in length, if operating its own railway would be amenable to the requirements of Section 795 supra, 842-a, Kentucky Statutes.

The Court further said:

In *Louisville Railway Company v. Commnowealth*, 130 Ky., 738, discussing as to what railroads, Section 795, supra, were applicable to, it was said: 'But interurban railroads are required by law to do so (to furnish separate coaches for white and colored passengers) and they can not evade the performance of this duty by leasing or otherwise turning over the use of their lines to a street railway or other railroads.' In *L. & N. R. R. Co. v. Commonwealth*, 120 Ky., 91, this Court, discussing the obligations of railroad corporations, generally said: 'But in any event appellee can not be permitted to escape the performance of any duty or obligation imposed by its charter or the general laws of the state by transferring its road or any part thereof to a lessee.' Hence so long as the *Cincinnati, Covington & Erlanger Railroad* continues to be an interurban railroad, the persons or company operating railroad coaches upon it, are amenable to the requirements of Section 795 supra, and the corporation, itself if it authorizes any other person or company to operate the railroad, contrary to such statute, will be amenable to punishment under it. (*Louisville Railway Company v. Commonwealth*, supra.)

In other words, the Court of Appeals of Kentucky held that this car was an interurban car, and actually operated as an interurban which, of course, is not a federal question, and which construction of the State Statute this

Court will adopt. The federal question involved is, whether or not there was a burden upon, or an illegal regulation of, the interstate buisness of this car. The Court of Appeals of Kentucky simply held that the *Cincinnati, Covington & Erlanger Railway Company*, while operating in Kentucky between points in Kentucky only, was required to provide separate accommodation for white and colored passengers.

We are familiar, of course, with the principles announced in *Mississippi Railroad Commission v. Illinois Central Railroad Company*, 203 U. S., 335, and *Southern Pacific Company v. Schuyler*, 227 U. S., 601, to the effect that it may become necessary to examine the facts upon which the decision of the State Court rests, to determine whether or not there has been an unconstitutional exercise of power, but we submit that no federal right has been denied, as a result of the finding of fact in this case, that this car in its method of operation, was an interurban car.

All the cases cited by counsel under this heading, *Chicago, Burlington & Quincy Railroad Co., v. Railroad Commission of Wisconsin*, 237 U. S., 220; *Sea Board Air Line Railway Co., v. Blackwell*, 244 U. S., 310; *Missouri, Kansas & Texas Railway Company v. State of Texas*, 245 U. S. 484, refer to the method of operation of interstate trains. Requiring an interstate train to stop at a certain point, might or might not be an illegal burden upon interstate commerce, depending upon the reasonableness of the order, but it has never been held that separate coach laws, applying only to the operation of trains, within the State, have been such a burden.

THE FACTS

Under the above heading counsel for plaintiffs in error have abstracted a part of the testimony taken in these cases, some of which tends to show that some branches of the State government in matters of taxation, treated the *Cincinnati, Covington & Erlanger Railway Company* as a street railway and not an interurban line. Whether this testimony was material, or not, at the time it was taken, it is certainly not material now, because the Court of Appeals of Kentucky has disposed of this matter by finding as a fact that this *Cincinnati, Covington & Erlanger Railway Company* was an interurban company, and that the car operated over its line of railway was an interurban car. The question here now is, not whether or not the *Cincinnati, Covington & Erlanger Railway Company* was an interurban car, but whether or not the application of the separate coach law to this company's method of operation of its cars, under the facts in the case, was an unlawful interference with interstate commerce.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY AND THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY ARE BOTH GUILTY OF A VIOLATION OF THE SEPARATE COACH LAW.

The testimony shows (Case No. 757, Rec., Pp. 21-30), that there was an intimate association, if not identity between the two companies. They had the same directors and practically the same officers. Both companies occupied the same offices and were under the same general

management, and at all times the directors and officers of one company were familiar with the affairs of the other. That the *South Covington & Cincinnati Street Railway* became the owner of all the stock of the *Cincinnati, Covington & Erlanger Railway Company*, except the qualifying shares of the directors of the latter company, and in a word, that their association was so intimate, that it was not thought necessary to put any contract on record with reference to the operation of the *South Covington & Cincinnati Street Railway's* cars over the line of railroad of the *Cincinnati, Covington & Erlanger Railway Company*. Upon the authority of the *Louisville Railway Company v. Commonwealth*, and *Louisville Interurban Railroad v. Commonwealth*, 130 Ky., 738, the Court of Appeals of Kentucky held in this case as follows:

> It is contended that the *South Covington & Cincinnati Street Railway Company* is authorized by its charter to operate a street railroad upon the road of the *Cincinnati, Covington & Erlanger Railway Company*, but an examination of the charter does not seem to justify this contention, and if authorized to operate the line, not being a street railroad, it would be required to comply with the statute in its operation. It is very clear that the *Cincinnati, Covington & Erlanger Railway Company* being an interurban road, with authority under its charter to build an electric railroad ten miles in length (*Devon v. Cincinnati, Covington & Erlanger Railroad Company*, supra), it, if operating its own railway, would be amenable to the requirements of Section 795, supra, (Section 842-a Ky. Stat.). In *Louisville Railway Co. v. Commonwealth*, 130 Ky., 738, 114, S. W. 343, 132, Am. St. Rep., 408, discussing as to what railroads Section 795, supra, was applicable to, it was said: 'But interurban railroads are by law required to do so (to furnish separate coaches for white and colored passengers), and they can-

not evade the performance of this duty by leasing or otherwise turning over the use of their lines to a street railway or other railroad.'

In *Commonwealth v. L. & N. R. R. Co.*, 120, Ky. 91, 85 S. W., 712, 27 Ky. Law. Rep., 497, this Court, discussing the obligations of railroad corporations, generally, said:

"But, in any event, appellee cannot be permitted to escape the performance of any duty or obligation imposed by its charter or the general laws of the state by transferring its road, or any part thereof, to a lessee."

Hence so long as the *Cincinnati, Covington & Erlanger Railroad* continues to be an interurban railroad, the persons or company operating railroad coaches upon it are amenable to the requirements of Section 795 supra, and the corporation itself, if it authorized any other person or company to operate the railroad contrary to such statute, will be amenable to punishment under it. *Commonwealth v. Louisville Railway Company*, supra.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY IS NOT ENGAGED IN INTERSTATE COMMERCE.

The Court of Appeals in its opinion affirming these cases, said:

Neither is the statute, supra, when applied to the indictments and evidence in these cases an unreasonable interference with or regulation of interstate commerce and violation of the commerce clause of the federal constitution. Each of the termini as well as all the stations of the *Cincinnati, Covington & Erlanger Railway Company's* road is within the State of Kentucky. The operation of a train upon this road, while it may be extended into another state, by connecting it

with and operating it upon the track of another company, the fact yet remains that it is operated the entire length of the line of the *Cincinnati, Covington & Erlanger Railway Company*, in the State of Kentucky. The offense charged and for which the defendants were convicted was the operation of the railroad in an unlawful manner within the State, and in violation of one of the measures enacted under the police powers of the State. *L. & N. R. R. Co., v. Commonwealth*, 171 Ky., 355, 188 S. W., 394, supra. The holding of this Court in *Chiles v. C. & O. R. R. Co.*, 125 Ky., 304, 101 S. W., 386, 30 Ky. Law Rep., 1332, 11 L. R. A. (N. S.) 268, with regard to the application of the statute under consideration to the transportation of an interstate passenger, is adhered to, and not overlooked.

The section of the statute under which this prosecution is brought does not require the company, or its agents, to assign white and colored passengers to separate compartments. It merely requires that the company, between Montague Street, in the City of Covington, Kentucky, and a point on the Lexington Pike, a few miles outside of the City, and in the same State, shall provide upon its cars suitable and convenient compartments for the two races. So far as this case is concerned, we may concede that a passenger who got upon a car in Cincinnati, to ride to the end of the line, could not be assigned to the compartment set apart to his race, after the car had reached the tracks of the *Cincinnati, Covington & Erlanger Railway Company*. If the company had provided this car with a partition with removable signs, designating the race to occupy the compartments, it would comply with the law by merely posting these signs in Kentucky and removing them in Ohio. So far as this prosecution is concerned, there would be no violation of the law if this particular

car in question had had the white compartment filled in Cincinnati with passengers of color, and the colored compartment filled in the same city with white passengers, and had permitted these passengers to ride through to the end of the line, if at the same time it had merely provided separate compartments designating the races to occupy them. In other words, it seems to us that all the inconveniences and burdens suggested by counsel in their brief arise from a conception that the prosecution is based upon a violation of the law of Kentucky requiring the company through its agents to assign the passengers. If this misconception is eliminated, and the fact merely is considered that the law simply requires the company to furnish separate compartments or coaches without reference to the duty of the company through its agents, to separate the races, all difficulties, it seems to us, disappear. Of course, there will always exist practical difficulties in the operation of railroads and street car lines in compliance with the law. In the case of the *South Covington & Cincinnati Street Railway Company v. City of Covington*, 235 U. S., page 537, in a prosecution against the same company for failing to comply with a city ordinance, the company claimed that it was an interstate carrier and that the ordinance was an unreasonable interference with interstate commerce. This Court sustained the position of the company with reference to certain parts of the ordinance, but held as follows:

> There are other parts of the ordinance which we are of the opinion are within the authority of the state and proper subject matter for its regulation; at least until the federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless

> the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless rail or barrier be provided separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirements to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this Court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business and not subjecting the asme to unreasonable demands.

It must be remembered that it was not necessary for the *Cincinnati, Covington & Erlanger Railway Company* to organize under a railroad charter, for, according to counsel's contention, the *South Covington & Cincinnati Railway Company* had the right to build street railways outside of the City. But the *Cincinnati, Covington & Erlanger Railway Company* has voluntarily assumed incorporation under the general railroads laws, and thereby has assumed all the burden thereof. If the *South Covington & Cincinnati Railway Company* now finds itself in difficulties, by reason of its contract with the *Cincinnati, Covington & Erlanger Railway Company*, it may by reason of the identity of management surrender the charter of the railway company and operate the line under the street railway charter. It might, if it deems it more convenient to do so, operate its cars over the right of way of the *Cincinnati, Covington & Erlanger Railway Company*, to the terminus in Covington, on Montague Street, or attach a separate car and then transfer its passengers to cars operating on the tracks of the *South Covington & Cincinnati Street Railway Company*.

It must be remembered also, that the Kentucky separate coach law also contains the following Section:

> Section 796. *No discrimination in coaches or compartments.* That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

Counsel has cited the case of *Hall v. DeCuir*, 95 U. S., page 485. We submit this case is not in point at all. Here the Statute of Louisiana, provided that no discrimination should be made between white and colored passengers, in other words, that common carriers were forbidden to refuse admission to their conveyances, or expel therefrom any person whatsoever, except when there was no accommodation for those passengers, or except when they were disorderly, etc. The Supreme Court held the Statute unconstitutional and void, because it was an unreasonable interference with interstate commerce, in that it requires the master of a steamboat to segregate and separate the passengers, and not because it required the company operating the boat to provide suitable and proper accommodations for both races. This is perfectly clear from the following language:

> —congressional inaction left Bennet at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage into Louisiana, or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State Court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly

> established. We think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void.

In the case of *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Illinois*, 177 U. S., 514, this Court held upon the facts that the Statute of Illinois, requiring every railroad corporation to stop all regular trains at County Seats, was an unreasonable regulation of interstate commerce. This Court did say, however, that "the distinction between this Statute * * * * and other similar requirements, contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion."

The case of *Chesapeake & Ohio Railway Company v. Kentucky*, 179 U. S., page 388, we think is in point with the case at bar. This was an indictment brought under Section 795, of the separate coach law against the *Chesapeake & Ohio Railroad Company*. The company demurred upon the ground that the law was repugnant to the Constitution of the United States, in that it was a regulation of interstate commerce. The demurrer was overruled and the case tried by a jury, which found a verdict of guilty and fixed the fine at $500.00. The Court affirmed the conviction, which holding was affirmed by this Court. The Court said:

> Of course, this law is operative only within the state. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same

to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the state. The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the state, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches when traveling from or to points in other states.

The Court quoted from the case of *L. N. O. & T. R. Co., v. Mississippi*, 133 U. S., 587, where the construction of a similar statute was involved, as follows:

> So far as the 1st section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company, but no more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state. No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the powers given to Congress by the commerce clause.

In this case, *Chesapeake & Ohio Railway Company v. Kentucky*, supra, the Court concluded with the finding of fact by the Court of Appeals of Kentucky, that the statute never applied to interstate business and quotes the Court of Appeals of Kentucky as follows:

If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the state, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this state, and railroad companies receiving passengers in this state, are bound to obey the law in respect to this matter, so long as they remain within the jurisdiction of the state.

This Court then goes on to say:

This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of all white and colored passengers, while they are in the state, without reference to where their journey commences and ends, and of the further contention that the policy would not have been adopted if the act had been confined to that portion of the travel which commenced and ended within the state lines. Indeed, it places the court of appeals of Kentucky in line with the supreme court of Mississippi, in *Louisville, N. O. & T. R. Co. v. Mississippi*, 66 Miss. 662, 5 L. R. A. 132, 2 Inters. Com. Rep. 615, 6 So. 203, which had held the separate coach law of that state valid as applied to domestic commerce. Granting that the last sentence from the opinion of the court of appeals, above cited, would seem to justify the railroad in placing interstate colored passengers in separate coaches, we think that this prosecution does not necessarily involve that question, and that the act must stand, so far as it is applicable to passengers traveling between two points in the state.

Indeed, we are by no means satisfied that the court of appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to

impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, the law applying on its face to all passengers should be limited to such as the legislature were competent to deal with. The court of appeals has found such to be the intention of the general assembly in this case, or, at least, that if such were not its intention the law may be supported as applying alone to domestic commerce. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal.

We believe that this finally disposes of the question. Of course, it is ably argued by counsel for plaintiffs in error, that many inconveniences would result from the enforcement of this law, but these are merely incidental to the enforcement of every law. Several of these inconveniences are suggested:

(a) That it would be impracticable to attach to the interstate cars, when they reach the Kentucky side of the state line, an additional car, and to detach it when reaching that line on the return trip. The reasons given are, that the point at the Suspension bridge, where these cars enter Kentucky, is a too densely populated part of the City of Covington, for the maintenance of necessary tracks and yards. It is not of course in the record that this is a densely populated community at this point. As a matter of common knowledge, the Court may assume that at this point it might be a matter of great convenience to the traveling public to attach a trailer for the convenience of local travel. Our suggestion is, that the law is fully complied with by the mere installation of a compartment in double truck cars, now commonly used, and, which so far

as this record shows, may be used on the lines of the plaintiffs in error, and the installation of compartments in these cars is a matter of no inconvenience at all. As suggested before, the *South Covington, & Cincinnati Street Railway Company* might run its cars to a point where they now connect with the lines of the *Cincinnati, Covington & Erlanger Railway Company*, and transfer at that point. The same objection that is made by the *Cincinnati, Covington & Erlanger Railway Company* in this case might well be made by any interstate railroad company.

(b) That if the separate coach or compartment were furnished, it would in practice directly affect interstate travel. It is suggested that a colored passenger entering a car in Cincinnati could not be assigned to the separate car, or compartment, in Ohio, and he could not be assigned at all because he was an interstate passenger. The Court of Appeals of Kentucky, in this case has expressly held that the separate coach law only applies to intra-state travel, and therefore it can not be assumed that a colored passenger getting on in Ohio would be affected at all. The only place where it is sought to enforce the operation of the statute is between the two termini of the *Cincinnati, Covington & Erlanger Railway Company* in Kentucky.

(c) That the Cincinnati, Covington and Erlanger Railway Company's line is operated as part of a street railway system. That the cars which are frequently interchanged back and forth on other parts of the same tracks are ordinary street cars.

In reply to this we say that these are merely some of the incidental and practical difficulties which are not impossible of solution. The Statute requires companies

operating coaches under railroad charters, to furnish separate compartments or coaches for white and colored passengers, and the *Cincinnati, Covington & Erlanger Railway Company*, can not be excused from complying with the law requiring it to provide separate coaches on its line operating exclusively in Kentucky, because of the fact that it has voluntarily entered into contracts and arrangements with other companies for the purpose of evading the law.

We respectfully submit that the judgment in each case should be affirmed.

STEPHENS L. BLAKELY,
Commonwealth's Attorney.

CHAS. I. DAWSON,
Attorney General,
For Defendant in Error.

CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 253. Argued March 18, 19, 1920.—Decided April 19, 1920.

Decided on the authority of *South Covington & Cincinnati Street Ry. Co. v. Kentucky, ante*, 399.
181 Kentucky, 449, affirmed.

THE case is stated in the opinion.

Mr. Alfred C. Cassatt, with whom *Mr. J. C. W. Beckham*, *Mr. Richard P. Ernst* and *Mr. Frank W. Cottle* were on the briefs, for plaintiff in error.

Mr. Stephens L. Blakely, with whom *Mr. Chas. I. Dawson*, Attorney General of the Commonwealth of Kentucky, was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was argued with No. 252, *South Covington & Cincinnati Street Ry. Co.* v. *Kentucky*, *ante*, 399. It was disposed of by the Court of Appeals with that case in one opinion. The company was indicted as the other company was for a violation of the Separate Coach Law of the State and found guilty. The facts are in essence the same as in the other case, though the indictment is more elaborate. The defenses and contentions are the same. We have stated them, and upon what they are based, and the character and relation of the companies, in our opinion in the other case.

The company is an interurban road and the Separate Coach Law is applicable to it. It was incorporated under the general laws of the State and authority conferred upon it to construct and operate an electric railway from the City of Covington to the town of Erlanger, and to such further point beyond Erlanger as might be determined. It was constructed from Covington to a point just beyond the suburban town called Fort Mitchell, a town of a few hundred inhabitants.

The South Covington and Cincinnati Street Railway Company furnished the means to build the road and at the time covered by the indictment was operating the road as part of its railway system as described in the other case.

The intimate relations of the roads as stated by the Court of Appeals, we have set forth in the other case, and it is only necessary to add that the indictment in the present case charges that the company in this case was

the lessor of the other company and thereby "permitted and brought about the acquisition of its rights and privileges knowing that" the other company, "would not operate and run separate coaches for its white and colored passengers." And, it is charged that the other company operating the lease violated the law and that the defendant company knowing of the intended method of operation, also violated the law. These facts and other facts the Court of Appeals decided made the company an offender against the statute, and decided further that the statute was not an interference with interstate commerce. The conviction of the company was sustained.

Our reviewing power, we think, is limited to the last point, that is, the effect of the law as an interference with interstate commerce, and that we disposed of in the other case. The distinction counsel make between street railways and other railways, and between urban and interurban roads, we are not concerned with.

Judgment affirmed.

MR. JUSTICE DAY, dissenting.

This case is controlled by the disposition made of No. 252. While it is true that the Erlanger Company was incorporated under the laws of the State of Kentucky, the proof shows that its road was built and operated by the South Covington & Cincinnati Street Railway Company as part of the latter's system. This is not a proceeding to test the right to operate the road. The conviction is justified because the local company permitted the principal company to operate without separate coaches or compartments for its colored passengers. The traffic conducted is of an interstate nature, and the same reasons which impel a dissent in No. 252 require a like dissent in the present case.

In my opinion the single traffic over both railroads being

interstate, the regulation embodied in the statute and for which the conviction was had, as to both roads, is an unreasonable and burdensome interference with interstate commerce.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY concur in this dissent.